

**THE EFFECT AND IMPACT OF NATIONAL AND INTERNATIONAL LAW ON
FOREIGN INVESTMENT IN SOUTH AFRICA**

by

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DECLARATION

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Exact wording of the title of the dissertation or thesis as appearing on the copies submitted for examination:

THE IMPACT OF NATIONAL AND INTERNATIONAL LAW ON FOREIGN INVESTMENT IN SOUTH AFRICA

I declare that “**The impact of national and international law on foreign investment in South Africa**” is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

SIGNATURE

DATE

ABSTRACT

Foreign Direct Investment (FDI) is one of the factors that can influence the growth and development of the economy of a country, but on the other hand, it could have a negative effect if not regulated properly by the host country. States must ensure that FDI is properly regulated in the best interests of the country and the foreign investor itself. South Africa has reviewed its foreign investment legal framework and during this process, it terminated most of its bilateral investment treaties that previously regulated foreign investment in the country. In turn, it introduced the Protection of Investment Act that regulates both domestic and foreign investment. This study analyses the way in which national and international investment law affect FDI inflow and the economy of South Africa. The study also deals with the determinants of foreign investment in the host country and the extent to which they have an influence on the inflow of FDI.

KEY WORDS

Bilateral Investment Treaty, Domestic investor, Economic development, Foreign Direct Investment, Foreign investor, Gross Domestic Product, International Economic Law, International Minimum Standard of Treatment, Protection of Investment Act, South Africa, United Kingdom

ABBREVIATIONS AND ACRONYMS

BIT	Bilateral Investment Treaty
BOR	Bill of Rights
CAIC	China Administration for Industry and Commerce
DA	Democratic Alliance
DIRCO	Department of International Relations and Co-operation
DTI	Department of Trade and Industry
EFF	Economic Freedom Fighters
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
GA	General Assembly
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ILC	International Law Commission
IMF	International Monetary Fund
IMST	International Minimum Standard of Treatment
ITO	International Trade Organisation
MIGA	Multilateral Investment Guarantee Agency
MMLC	Management Markets and Legal Consulting
MPRDA	Mineral and Petroleum Resources Development Act
MST	Minimum Standard of Treatment
NA	National Assembly
NAFTA	North American Free Trade Agreement
NCOP	National Council of Provinces
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SADC	Southern African Development Community
SAECR	South African Exchange Control Regulation
SAGNA	South African Government News Agency
SAHO	South African History Online
SAIRR	South African Institute of Race and Relations
TDCA	Trade Development and Cooperation Agreement
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
VC	Vienna Convention
WTO	World Trade Organisation

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CHAPTER 1: GENERAL INTRODUCTION

1.1 INTRODUCTION TO THE PROTECTION OF FOREIGN DIRECT INVESTMENT IN SOUTH AFRICA

International economic law is one of the realms of law that regulates the international investment agreements and economic relations between states and private entities. It is a field of international law with its own distinctive characteristics that relates to the rules, which address matters that are regarded as part of the exclusive domestic jurisdiction of states.¹ These characteristics are an indication of the economic development of states as structured by the international community.²

International economic law encompasses various areas of law, for example, the principles of international trade law, private international law, international law of foreign direct investments,³ and legal transactions in international law. This study focuses only on the law governing FDI in South Africa. A foreign direct investment is an investment made by a state or private individual or a private entity in a foreign country for the acquisition of a financial or economic advantage from the asset over a period of time.⁴

The late former president of South Africa, Nelson Mandela, emphasised the importance of FDI in an article that he wrote in 1993 for the Department of Foreign Affairs.

Mandela stated the following:

“It is obvious to me that the primary components of our international economic relations, which must feed our development strategy, are the strengthening of our trade performance and our capacity to attract foreign investment. In addition, we must examine the possibilities of obtaining technical and financial assistance from the industrialized countries”. We do not expect foreign

¹ Elgar E *International Economic Law: Globalisation and Developing Countries* (2010) 10-11.

² *Ibid.*

³ Foreign Direct Investment (hereinafter referred to as the FDI).

⁴ Booyesen H *The Principles of International Trade Law as a Monistic System* (2003) 531-532.

investment to solve our economic problems, but we understand it can play a valuable role in our economic development”.⁵

“The ANC believes the most important way to attract foreign investment is to create a stable and democratic political environment. Also important is the development of legitimate, transparent, and consistent economic policies. Foreign companies should be treated as domestic companies, obeying our laws and gaining access to our incentives, and the ANC is committed to the principle of uniform treatment. And while we do not plan to provide exclusive incentives for all foreign investors, we realize it might be necessary to make special arrangements to attract the kind of investment that will make a real difference in South Africa”.⁶

South Africa is one of the developing countries that are often confronted with the question of whether to implement or repeal laws that no longer serve the objectives of the country. This could be because there is a need for new laws to be implemented or for existing laws to be amended should they no longer be consistent with the Constitution.⁷

As a democratic developing country, South Africa has a constitutional obligation to secure ecologically sustainable development.⁸ In order to realise and to fulfil this obligation, South Africa has enacted many domestic laws such as the Expropriation Act,⁹ and the Arbitration Act.¹⁰ South Africa has entered into many international agreements such as the Southern African Development Community Free Trade Agreement,¹¹ the Trade Development and Cooperation Agreement (TDCA),¹² and Bilateral Investment Treaties (BITs) with a number of foreign countries.¹³

⁵ Mandela N “South Africa’s future foreign policy” <https://www.foreignaffairs.com/articles/south-africa/1993-12-01/south-africas-future-foreign-policy> (Date of use: 11 September 2015).

⁶ *Ibid.*

⁷ The Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).

⁸ See s 24 of the Constitution.

⁹ The Expropriation Act 63 of 1975 (hereinafter referred to as the Expropriation Act).

¹⁰ The Arbitration Act 42 of 1966 (hereinafter referred to as the Arbitration Act).

¹¹ The Southern African Development Community Free Trade Agreement (hereinafter referred to as the SADC FTA).

¹² Trade Development and Cooperation Agreement (hereinafter referred to as the TDCA).

¹³ These are international investment agreements that South Africa has concluded with other countries.

1.2 PROBLEM STATEMENT

FDI is one of the vehicles that influences the growth and development of the economy of a country.¹⁴ However, it may also negatively affect the economy of a country. This means that states must ensure that FDI is properly regulated in the best interest of the country and the foreign investors themselves. For example, a foreign company will be reluctant to invest in a country that does not promote its interests. Therefore, the laws regulating international investments must be structured in such a way that they provide incentives for foreign investors to invest in a certain country.

There are many factors that affect and have an impact on the behaviour of foreign investors towards a host country. Equally so is the competing interest of the host state. This means that there has to be an exercise of balancing these competing interests in order to create a mutually conducive foreign investment environment, for example, governance and security, political stability, openness to regional and international trade, competitiveness, local market and international/ global market access, foreign direct investment protection, legal and policy requirements for investments, business climate and regulatory environment.

It is generally accepted that when dealing in international commerce, states, private individuals and entities prefer the rules of international law over domestic law. The reason is that the state may enact laws that are more favourable to the state and its nationals than foreign investors. However, on the international plane, parties entering into foreign agreements have a wide discretion with regard to many aspects of those agreements. For example, they have the discretion to choose the law that will be applicable to their agreements, the competent body that will resolve disputes arising from such contracts, and how to treat such agreements in a case where one of the party's laws changes, or where there is no stabilisation clause. This is known as the principle of contractual autonomy pertaining to the choice of law.¹⁵

FDI often provides economic growth and sustainable economic development for the parties involved.¹⁶ A foreign direct investment is an investment made by a state or a private individual or a private entity in a foreign country for the purpose of acquiring

¹⁴ Booyesen H *The Principles of International Trade Law as a Monistic System* (2003) 429-431.

¹⁵ Woodward W J "The contractual choice of law: legislative choice in an era of party autonomy" 2001 *SMU Law Review* 711.

¹⁶ Booyesen H *The Principles of International Trade Law as a Monistic System* (2003) 429-431.

financial or economic advantage from the asset over a period of time. According to Kearney, South Africa ranks as the 13th most attractive destination in the world among foreign investors, although in 2013, it still ranked two positions higher.¹⁷

There is a need for foreign investment policies that will not only benefit South Africa and its nationals, but that will attract foreign investors and make them to have faith and confidence in the country's legal system to provide the necessary protection in cases of dispute. One has to take cognisance of the fact that states have an obligation to govern in the public interest, especially at times when laws and policies are adopted or repealed.

This is evident from the case of *Piero Foresti, Laura De Carli v Republic of South Africa*,¹⁸ which came before the International Centre for the Settlement of Investment Disputes¹⁹ in 2007. This case challenged certain provisions of the Mineral and Petroleum Resources Development Act.²⁰ The proceedings were initiated by the claimants under Article 8 of the Italy-SA BIT²¹ and Article 10 of the Belgo/Luxembourg-SA BIT.²² These two articles contain similar provisions.

The claimants averred that certain provisions of the MPRDA and the Broad-Based Black Economic Empowerment Act²³ amount to acts of expropriation and thus violate South Africa's obligation to provide for a fair and equitable of obligations under the Italy-SA Bilateral Investment Treaty. Although the case was dismissed, the South African government realised that there might be loopholes in the BITs that South Africa had concluded with other countries. This case was the first case to challenge South

¹⁷ Kearney A T "Ready for take-off" 2014 *Foreign Direct Investment Index* 20, available at <http://www.atkearney.com/documents/10192/4572735/Ready+for+Takeoff+-+FDICI+2014.pdf/e921968a-5bfe-4860-ac51-10ec5c396e95> (Date of use: 01 April 2015).

¹⁸ The *Piero Foresti, Laura De Carli V Republic of South Africa* ICSID case No ARB (AF)/07/1 (hereinafter referred to as the *Piero Foresti* case).

¹⁹ The International Centre for the Settlement of Investment Disputes (hereinafter referred to as the ICSID). The ICSID is an international institution that deals with the resolution of international investment disputes. Available at <https://icsid.worldbank.org/apps/icsidweb/about/pages/default.aspx>

²⁰ The Mineral and Petroleum Resources Development Act 49 of 2002 (hereinafter referred to as the MPRDA).

²¹ The Italy-South Africa Bilateral Investment Treaty, 1999 (hereinafter referred to as the Italy-SA BIT).

²² The Belgo/Luxembourg-South Africa Bilateral Investment Treaty, 1998 (hereinafter referred to as the Belgo/Luxembourg-SA BIT).

²³ The Broad-Based Black Economic Empowerment Act 53 of 2003 (hereinafter referred to as the BEEA).

Africa's obligations with regard to the BITs and as a result, South Africa embarked on an investment policies' review process in 2010.

The South African government, the DTI and the Department of International Relations and Cooperation, after a three-year investment policy review process, made a decision to terminate BITs with foreign states and introduced the Protection and Promotion of Investment Bill²⁴ in November 2013.²⁵ The Promotion and Protection of Investment Bill²⁶ was introduced and later gazetted as the Protection of Investment Act 22 of 2015 on the 15th of December 2015 and now serves to regulate the protection of foreign investment.²⁷ The Protection of Investment Act is not without controversy though.

Foreign governments and private entities have raised concerns with regard to the cancellation of South Africa's BITs, as the cancellations will affect the legal rights of foreign investors, whose main concern is security of tenure for their investments. Foreign investors are vulnerable when governments promote policy changes that could potentially have an adverse effect on the rights and legitimate expectations they have for investments.²⁸ On the other hand, South Africa as a host state, needs to promote sustainable economic development and promote Black Economic Empowerment²⁹ as required by the Constitution. Whereas domestic laws may be amended or changed unilaterally by parliament, provisions of BITs cannot. This is because the conclusion of BITs internationalise the legal association between the parties.³⁰

The BITs with most of European countries have already been terminated. South Africa has only three BITs in place with the SADC member countries out of the 15 SADC

²⁴ The Protection and Promotion of Investment Bill, 2013 (hereinafter referred to as the Protection of Investment Bill).

²⁵ Hurt S "Why South Africa is cancelling foreign investment deals"
<http://www.economywatch.coatures/south-africa-cancelling-foreign-investment.02-01.html> (Date of use: 23 October 2014).

²⁶ The Promotion and Protection of Investment Bill, 2013 (hereinafter referred to as the Investment Bill).

²⁷ Which has however not come into operation as no date has yet been determined by the President by proclamation in the Government Gazette.

²⁸ Drape P and Langalanga A "Does the draft Investment Bill threaten foreign investors' rights"
<http://www.saiia.org.za/opinion-analysis/draft-investment-bill-requires-amendment> (Date of use: 18 March 2016).

²⁹ Black Economic Empowerment (hereinafter referred to as the BEE).

³⁰ Booyesen H *The Principles of International Trade Law as a Monistic System* (2003) 210.

member states. However, the BITs with the BRICS countries, namely Russia, India and China are in force except for Brazil.³¹

The reason behind the termination of these treaties is that the proposed the Protection of Investment Bill will update and modernise South Africa's legal framework for foreign investments,³² while increasing the protection and promotion of both domestic and international investments.

The first BITs that South Africa terminated were with Germany, Switzerland and the Netherlands. These BITs were concluded by South Africa in the post-1994 era, the so-called first generation BITs.³³ These countries are collectively South Africa's biggest international investors.³⁴

The reason why South Africa terminated these BITs at that time is that these BITs were close to their termination dates and South Africa saw an opportunity to terminate them as they would otherwise have been automatically extended in terms of their renewal clauses. For example, the South Africa-Germany BIT contains a twelve months' notice period with a run-off protection for existing protected investments of twenty years,³⁵ while the South Africa-Netherlands BIT contained a six months' notice period with a 10-year automatic renewal period and a 15-year run-off period for investments made before the termination date.³⁶ The South Africa-UK BIT contained a twelve months' application period after the notice of termination and a 20-year run-off protection period for existing investments.³⁷

³¹ UNCTAD "Number of IIAs per economy"

<http://investmentpolicyhub.unctad.org/IIA/IIAsByCountry#iialInnerMenu> (Date of use: 22 May 2015).

³² Steyn P "The new Promotion and Protection of investment Bill for local and foreign Investors in South Africa" <http://www.polity.org.za/article/the-new-promotion-and-protection-of-investment-bill-an-assessment-of-its-implications-for-local-and-foreign-investors-in-south-africa> (Date of Use: 21 October 2014).

³³ The very first BIT concluded by South Africa in the post-1994 era was with the UK.

³⁴ SAIRR "Submission to the DTI regarding the Promotion and Protection of Investment Bill of 2013 – 31 January 2015" <http://irr.org.za/reports-and-publications/submissions-on-proposed-legislation/submission-to-the-dti-regarding-the-promotion-and-protection-of-investment-bill-of-2013-31-january-2015> (Date of use: 23 April 2015).

³⁵ Mossallam M "Process matters: South Africa's experience exiting its BITs" (*University of Oxford: The Global Economic Governance Programme 2015*)13.

³⁶ Articles 14(2) and 14(3) of the South Africa-Netherlands Bilateral Investment Treaty (hereinafter referred to as the SA-Netherlands BIT).

³⁷ Articles 14 of the South Africa-United Kingdom BIT (hereinafter referred to as the SA-UK BIT).

On 22 May 2015, South Africa had only 17 BITs in force out of the 40 BITs that were concluded in the past.³⁸ On the other hand, China, a developing and a BRICS country with a high Gross Domestic Product, has more than 108 BITs in place.³⁹

The introduction of the Investment Bill became a controversial and heated topic with regard to South Africa's new approach to regulating FDI and investors alike. Foreign governments and private entities have raised concerns with regard to the cancellation of South Africa's BITs, as the cancellations will affect the legal rights of foreign investors.⁴⁰

According to the Minister of Trade and Industry, the Investment Bill is meant to provide "adequate protection to all investors, including foreign investors", and it will ensure that "South Africa's constitutional obligations, like sustainable development,⁴¹ are upheld, while allowing government to retain the policy space to regulate in the public interest".⁴² He further argues that there is no connection between the growth of South Africa's economy and the BITs,⁴³ although some of these countries are South Africa's largest trading partners.⁴⁴

The main concern for foreign investors is security of tenure for their investments. Foreign Investors are vulnerable when governments promote policy changes that could potentially have an adverse effect on the rights and legitimate expectations they have with regard to their foreign investments.⁴⁵ On the other hand, South Africa as a host state needs to promote sustainable economic development and promote BEE as required by the Constitution. Domestic laws may be amended or

³⁸ UNCTAD "Number of IIAs per economy"

<http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iialInnerMenu> (Date of use: 27 March 2015).

³⁹ *Ibid.*

⁴⁰ To date no critical comments with regard to the Protection of Investment Act have been published. It is for this reason that the criticism that was expressed concerning the Investment Bill is dealt with here. Furthermore, most of the provisions of the Investment Bill were subsequently incorporated unchanged into the Protection of the Investment Act.

⁴¹ See s 2 of the Constitution.

⁴² SAGNA "Bill to help modernise SA's investment regime: Davies" <http://www.sanews.gov.za/south-africa/bill-help-modernise-sas-investment-regime-davies> (Date of use: 24 April 2015).

⁴³ *Ibid.*

⁴⁴ Forde F "Investment Bill: thick as a Brics?"

<http://www.financialmail.co.za/fmfox/2015/11/12/investment-bill-thick-as-a-brics> (Date of use: 16 November 2015).

⁴⁵ Drape P and Langalanga A "Does the draft Investment Bill threaten foreign investors' rights" <http://www.saiia.org.za/opinion-analysis/draft-investment-bill-requires-amendment> (Date of use: 18 March 2015).

changed unilaterally by parliament, while provisions of BITs cannot be changed unilaterally.

Nemeth⁴⁶ argues that the Investment Bill must provide a clear assurance that capital relating to investment and returns cannot be repatriated so that the investors should not lose their basic rights.⁴⁷ The European Union Chamber of Commerce⁴⁸ argues that the Investment Bill will not promote or protect the FDI in South Africa.⁴⁹ The EU Chamber pointed out that new investment decisions with South Africa have been put on hold, while disinvestment decisions are next on the agenda.⁵⁰ The EU Chamber of Commerce further argues that:

“By limiting the rights and expectations of committed and long-term investors and the predictability of changes which may affect their investments, including expropriation, the current Bill could invariably attract short-term investors, who do not pay much attention to investment frameworks, either because of the short turnaround time of their investments, or because they enjoy other preferential arrangements”.⁵¹

The Investment Bill has been promulgated without major amendments, even though it received a negative response from the international investment community. The Protection of the Investment Act contains only two of the five common provisions of BITs, namely, the national treatment and dispute resolution. The Protection of Investment Act is, by its nature, more favourable to domestic investors even though the definition of an investor includes both domestic and foreign investors.⁵²

The government of South Africa has however, adopted some changes to the Protection of Investment Act from the Investment Bill. For example, the title of the Protection of

⁴⁶ Nemeth J is the president of the American Chamber of commerce.

⁴⁷ Parly Reports SA “The Promotion and Protection of Investment Bill open up a major row” <http://parlyreportsa.co.za/finance-economic/promotion-and-protection-of-investment-bill-opens-major-row/> (Date of use: 18 March 2015).

⁴⁸ The European Union Chamber of Commerce (hereinafter referred to as the EU Chamber of Commerce).

⁴⁹ Parly Reports SA “The Bill will not promote or protect investment” http://www.politicsweb.co.za/documents/this-bill-wont-protect-or-promote-investment--eu-c?utm_source=Politicsweb+Daily+Headlines&utm_campaign=c383b1bce0-DHN_Sept_17_2015&utm_medium=email&utm_term=0_a86f25db99-c383b1bce0-130082905 (Date of use: 18 March 2015).

⁵⁰ Forde F “Investment Bill: thick as a Brics?” <http://www.financialmail.co.za/fmfox/2015/11/12/investment-bill-thick-as-a-brics> (Date of use: 16 November 2015).

⁵¹ *Ibid.*

⁵² The content of the Protection of Investment Act will be discussed in detail in chapter 3 below.

Investment Act has also been changed from the 'Promotion and Protection of Investment' to the 'Protection of Investment'⁵³ as well as the preamble in that it only focuses on protecting investments and not promoting and encouraging investments. The Protection of Investment Act contains an additional section that was not included in the Investment Bill namely, fair administrative treatment.⁵⁴ The heading of the provision dealing with security of investment has been changed from 'security of investment' to 'physical security of property'. However, there is no definition of 'a property' in the Protection of Investment Act. The provision dealing with protection of investment has been changed from 'protection of property' to 'legal protection of investment'.⁵⁵

The BITs also state that compensation for expropriation must be prompt, adequate and effective, while in terms of the Investment Bill the compensation is likely to be less than the market value.⁵⁶ The BITs provide for a fair and equitable treatment of foreign investments, while the Investment Bill emphasises the government's sovereign right to pursue various policy objectives, and states that the sovereignty right cannot be hindered by the investors' right to be protected.

In terms of the Investment Bill, the protection of foreign investors is subject to applicable domestic legislation,⁵⁷ rather than international law. The Investment Bill must not be interpreted to create a right of establishment for potential or foreign investments.⁵⁸ The Investment Bill further provides that security of investment is subject to availability of resources and capacity.⁵⁹ Furthermore, the Investment Bill provides that an aggrieved foreign investor must seek redress through a review by a competent domestic court or refer the matter to the domestic dispute resolution procedures.

The dispute resolution in terms of international law depends on whether the matter is between private investors, or between the state and a private investor. If the matter is between private investors, they can either take the matter on review through

⁵³ See s 16 of the Protection of Investment Act.

⁵⁴ *Id* at 6.

⁵⁵ *Id* at 10.

⁵⁶ See s 8(1) of the Investment Bill.

⁵⁷ See s 5(1)(a) of the Investment Bill.

⁵⁸ See s 5(2) of the Investment Bill.

⁵⁹ See s 7(1) of the Investment Bill.

international arbitration or diplomatic channels.⁶⁰ With regard to investor-state dispute settlement, the parties to the dispute can either take the matter to international arbitration, the International Centre for the Settlement of Investment Dispute (ICSID) or the International Chamber of Commerce (ICC).⁶¹

By looking at these inconsistencies between the Investment Bill and the BITs, one can easily conclude that certain provisions of the Investment Bill will make South Africa a non-friendly investment jurisdiction. It does not allow for the diversity and flexibility offered by the international investment agreements. The “pull factors” of foreign investments such as market size and growth, the quality of the infrastructure, the presence of natural resources, the availability of skills and technology are crucial in FDI.

The “pull factors” of investments are very low in South Africa, while the “push factors” like economic and social dumping are reasonably high. The introduction of the Investment Bill is likely to impair the economy. The South African government has already introduced many amendments to the MPRDA, the Labour Relations Act,⁶² the BBBEEA, and the land reform process.

The flow of the FDI may also be affected by economic and social dumping. This occurs where a country lowers the price of one of its sales to operators in the domestic market.⁶³ Economic and social dumping defeats the competition opponent to capture the market or so that the manufacturers and industry suffered losses.⁶⁴ In other words, “dumping is selling goods at lower value than comparable like products in the market they have been sold”.⁶⁵ Economic sanctions such as disinvestment may also affect the flow of the FDI.⁶⁶

⁶⁰ See s 11 of the Investment Bill.

⁶¹ International Chamber of Commerce (hereinafter referred to as the ICC). The ICC is an institution that promotes international trade and investment while helping business to meet the challenges of globalization.

⁶² Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA).

⁶³ Sibanda OS “Can BRICS house stand longer when built on dumping ground? The Impact of South Africa’s Anti-Dumping measures BRICS’ Intra-Trade Relations” (Paper delivered at the UNISA research Indaba @ Law Retreat, 28-30 April 2015) 3.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Wood R M “A hand upon the throat of the nation: economic sanctions and state repression, 1976–2001” 2001 *SMU Law Review* 489.

A question arises as to whether the Investment Bill, if approved by parliament, will encourage foreign investors to invest in South Africa and thus contribute to the growth of the country's economy. Entering into BITs allows the parties to insert the standard of treatment adequate to both parties. Most BITs contain an umbrella clause also known as the treatment of state obligation.⁶⁷ The umbrella clause extends the scope and jurisdiction of the application of BITs.⁶⁸

Taking cognisance of the fact that the South African government has a duty to ensure that its nationals benefit from the country's economic wealth, the question arises as to whether the enactment of the Investment Bill fulfils the constitutional requirements relating to securing sustainable economic development, and the promotion of justifiable economic and social development. Can the enactment of the Investment Bill protect and promote foreign investments in SA?

The government has an obligation to enact laws that will ensure that the entire population will actively share in the wealth of the nation derived from the FDI within the realm of domestic laws and international trade laws. Therefore laws must be enacted in such a way that they protect the interest of international investors and secure ecological sustainable development while promoting justifiable economic and social development.⁶⁹ States are often confronted with the challenge of addressing their domestic political and economic situation while fulfilling their obligations to international investors who have invested in the country.⁷⁰

1.3 RESEARCH QUESTIONS

How was foreign direct investment regulated in the pre-1994 era in South Africa? What encouraged South Africa to introduce the Investment Bill and phase out the BITs? Is it possible to have the investment Bill and BITs operate concurrently and what will be the consequences thereof? Will it uphold the constitutional values? Does South Africa have a beneficiation strategy?

⁶⁷ The umbrella clause is a clause that is inserted into a BIT by which both parties make a commitment to each other to observe any obligation assumed by the conclusion of the BIT. See Salacuse J W *The law of Investment treaties* 271.

⁶⁸ Chaisse J and Bellak C "Navigating the expanding of international treaties on foreign investment: creation and use of critical index" 2015 *Journal of International Economic Law* 86-87.

⁶⁹ See s 24(b)(iii) of the Constitution.

⁷⁰ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2012) 59.

What are the international legal frameworks and standards that South Africa would have to comply with in order to enact the Protection of Investment Act? What are the international legal frameworks required to regulate FDI in a manner that will promote sustainable economic development and protect foreign investment in terms of section 24 of the Constitution? Why do developing countries with few nationals who are unlikely to invest abroad sign investment treaties with developed countries, which have the effect of restraining government's actions in their dealing with foreign investors? Will the FDI flow increase if South Africa regulates the investment sector without isolating itself from the international investment community? The aims and objectives of the study are also dealt with in the first. The aims and objectives of the study also forms the basis of this study.

1.4 AIMS AND OBJECTIVES OF THE STUDY

The purpose of the study is to analyse the way in which national and international affect the FDI inflow and the economy of South Africa. In order to do this the study will follow in the below chronological order.

The study will commence with the introduction to the protection of investment in South Africa. It will also look at the general historical overview that will deal with the FDI legal framework economy during the pre-1994 era in South Africa and the position of South Africa's economy during this period. It will also look at the South African economy during the operation of BITs in the post-1994 era. The study will analyse certain provisions of two BITs, namely the China-SA BIT and the UK-SA BIT. The study will look at the China-SA BIT because China is one of the BRICS countries with high a GDP. The UK-SA BIT was chosen because it was the first BIT that South Africa concluded in the post-1994 era.

The study will then look at the factors and challenges that led to the new approach to the regulation of investments in South Africa. This will ensure an understanding of the BITs, whether or not the BITs managed to fulfil the duties and obligations to protect and promote foreign investors in South Africa.

The determinants of FDI at the national level will be discussed in detail. In this regard, the political stability, potential economic growth, the rule of law, openness and transparency, the size of the population, exchange rate considerations and openness to regional and international trade will be discussed. Then the protection of FDI in

accordance with international law will also be discussed. The study will critically analyse the protection of Protection of Investment Act.

The study will look at different laws from different countries to establish whether there are other countries that did away with the BITs, or whether they allowed the BITs to operate alongside national laws and their consequences thereof. The study will look at the impact these laws had on the FDI in South Africa.

1.5 LITERATURE REVIEW

Most policy makers believe that the FDI contributes to the economy of a country. However, there need to be laws that regulate the FDI in order to combat failure of those investments laws. As stated above the termination of the BITs by South Africa raised global concerns with regard to the FDI because the international investment community may not regard South Africa as a friendly investment jurisdiction.

There is a paucity of literature dealing with the new approach to regulating FDI in South Africa because this is a recent development. The Minister of the DTI is certain that the new investment legal framework will attract more investors to South Africa, while scholars and economists are sceptical about South Africa's approach the new investments regulation.

Carim,⁷¹ although accepting that the BITs signalled South Africa's re-entry into the international community after years of isolation,⁷² argues that other countries have also embarked on the investment protection review.⁷³ He argues that the first generation BITs concluded by South Africa are ambiguous and makes for unpredictable interpretation.⁷⁴ He goes further to say that, they are inconsistent with the Constitution.⁷⁵ Another critic of BITs opines that

⁷¹ Mr Xavier Carim is a deputy director general in the Department of International Trade and Economic Development.

⁷² Carim X "International Investment Agreements and Africa's structural transformation: A perspective from South Africa" http://www.southcentre.int/wp-content/uploads/2015/08/IPB4_IAs-and-Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf (Date of use: 26 November 2015).

⁷³ *Id* at 5-6.

⁷⁴ Carim X "Review of BITs"

http://www.safpi.org/sites/default/files/publications/dti_review_of_bits_ppc_20130215.pdf (Date of use: 06 May 2015).

⁷⁵ *Ibid*.

“The system’s unique use of private arbitration conflicts with cherished principles of judicial accountability and independence in democratic societies and this taints the integrity of the legal system by contracting out of the judicial function in public law”.⁷⁶

Subedi⁷⁷ argues that investors use the BITs to ensure that regulation of investments in host states is more transparent, stable, predictable and secure. Mossallam stipulated that the bureaucrats who negotiated of the first generation BITs were not lawyers and had little legal and technical expertise in international law.⁷⁸ However, the first ever BIT that South Africa concluded with Paraguay in 1974 is still in force.⁷⁹ Although the Protection of Investment Act deals with some of the difficulties in investment, it does not deal with most issues that will affect the future FDI in South Africa.

Hills-Lewis⁸⁰ argues that the Protection of Investment Bill, instead of offering more protection to foreign investors, it diminishes their protection.⁸¹ He further argues that the Investment Bill contradicts South Africa’s international commitments under the SADC Protocol on Finance and Investment, which stipulates that member states’ investment legislation should provide for greater protection than the protection that international law affords foreign investors.⁸²

Using the view of the minister of the Minister of the DTI, Carim, Hills-Lewis and the *Piero Foresti* case as a point of departure, the study will look at whether or not the new approach to the regulation of investments will indeed provide an incentive of foreign investments which will in turn influence the flow of the FDI in South Africa’s.

⁷⁶ Diehl A *International Investment Law in Context* (2008) 9.

⁷⁷ Subedi S P is a professor at the University of Leeds.

⁷⁸ Mossallam M “Process matters: South Africa’s experience exiting its BITs” (*University of Oxford: The Global Economic Governance Programme* 2015) 8.

⁷⁹ UNCTAD “Number of IIs per economy”

<http://investmentpolicyhub.unctad.org/IIA/liaByCountry#iialInnerMenu> (Date of use: 27 May 2015).

⁸⁰ Hill-Lewis G is a spokesperson for the Democratic Alliances (hereinafter referred to as the DA).

⁸¹ RDM News Wire “ANC rams anti-Investment Bill through Committee, DA charges”

<http://m.polity.org.za/article/anc-rams-anti-investment-bill-through-committee-da-charges-2015-11-03> (Date of Use: 04 November 2015).

⁸² *Ibid.*

1.6 GENERAL MEANING AND DEFINITIONS OF FOREIGN DIRECT INVESTMENT

FDI is an equity or ownership investment of more than 10 per cent by an investor in one country⁸³ in an enterprise located in another country⁸⁴ for financial gain.⁸⁵ FDI is an investment made by a state or a private individual or a private entity in a foreign country for acquiring financial or economic advantage from the asset over a period of time.⁸⁶ FDI is one of the vehicles that could influence the growth and development of the economy of a country.⁸⁷ However, it may also negatively affect the economy of a country.

This means that states must ensure that FDI is properly regulated in the best interests of the country and its foreign investors. For example, a foreign company will be reluctant to invest in a country that does not promote its interests. Therefore, the laws regulating FDI must be structured in such a way that they provide incentives for foreign investors.

There are many factors that influence the behaviour of foreign investors towards a host country. Equally so is the competing interest of the host state. This requires a balancing of competing interests to create a mutually conducive foreign investment environment. For example, political stability,⁸⁸ openness to regional and international trade,⁸⁹ competitiveness,⁹⁰ local market and international/ global market access.⁹¹

On the international level, the rules of FDI law provide more protection than domestic law to foreign investors. This is because of the principles of international trade law, such as the *pacta sunt servanda* principle⁹² and the autonomy principle that provide protection for foreign investors.⁹³ The *pacta sunt servanda* requires the parties to the

⁸³ Also known as the home state.

⁸⁴ Also known as the host state.

⁸⁵ Salacuse J W *The Law of Investment Treaties* (2010) 29.

⁸⁶ *Ibid.*

⁸⁷ Hunter R *et al* "Foreign Direct Investment in South Africa" 1998-1999 *Denver Journal of international Law and Policy* 337.

⁸⁸ CIDA's Economic Growth Strategy "stimulating sustainable economic growth" 1 [http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUIImages/EconomicGrowth/\\$file/Sustainable-Economic-Growth-e.pdf](http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUIImages/EconomicGrowth/$file/Sustainable-Economic-Growth-e.pdf) (Date of use: 04 April 2016).

⁸⁹ *Ibid.*

⁹⁰ *Id* at 5.

⁹¹ *Ibid.*

⁹² Booyesen H *The Principles of International Trade Law as a Monistic System* (2004) 506-507.

⁹³ *Id* at 207-210.

international agreement to honour agreements that they have concluded at an international level.⁹⁴

Moreover, in terms of the autonomy principle, the parties on the international plane have a wide discretion regarding many aspects affecting their agreement.⁹⁵ For example, they have the discretion to choose the law that will be applicable to their agreements, the competent body that will solve disputes arising from such agreements, and how to treat such agreements in a case where one of the party's laws changes, or where there is no stabilisation clause. This is also known as the principle of contractual autonomy on the choice of law.⁹⁶ A stabilisation clause ensures that future changes to the law of one of the parties do not alter the terms of the agreement.⁹⁷ In other words, a stabilisation clause freezes the law that is applicable at the time of the conclusion of the agreement.⁹⁸

Historic events are essential in understanding the development of FDI that will suit the changing economic environment. This is because the modern FDI law is the product of a historical process that has developed over many years.⁹⁹ Therefore, rules of international investment law must be developed in such a way that they are flexible enough to fit the changing economic environment.

One of the instruments, which regulate international investment law, is the treaty. A treaty may be broadly divided into three categories, namely, contractual, legislative and Constitutional. A contractual treaty is drawn up between states and governs matters such as trade, extradition, air space, landing rights and mutual defence.¹⁰⁰ In this instance, states contract with each other to establish a particular legal relationship.¹⁰¹ A legislative treaty is entered into by states and codifies existing rules of customary international law or which create new rules of law.¹⁰² However, this type

⁹⁴ *Id* at 292-293.

⁹⁵ *Id* at 207-208.

⁹⁶ Woodward W J "The contractual choice of law: legislative choice in an era of party autonomy" 2001 *SMU Law Review* 711.

⁹⁷ Sornarajah M *The International Law on Foreign Investment* (2004) 407.

⁹⁸ *Ibid*.

⁹⁹ Subedi S P *The Law of Investment Treaties* (2010) 79.

¹⁰⁰ Dugard J *International Law: a South African perspective* (2012) 25.

¹⁰¹ *Ibid*.

¹⁰² *Ibid*.

of treaty, although it may be known as legislative or law-making, is only binding on member states.¹⁰³ International organisations, like the United Nations¹⁰⁴ are created by the by multilateral treaties such as the Charter of the United Nations which serves as a Constitution of the United Nations¹⁰⁵.

However, a treaty is founded on consent of the parties and binding only to its member states.¹⁰⁶ In the *S. S. Lotus (France v Turkey)*¹⁰⁷ the Permanent Court of International Justice¹⁰⁸ emphasised consent as the basis of international law. The PCIJ held that the rules of law binding upon states emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.¹⁰⁹

The Vienna Convention on the Law of Treaties defines a treaty as follows:

“an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.¹¹⁰

Before the development of BITs, Bilateral Economic Treaties, such as the Treaties of Friendship, Treaties of Commerce and Treaties of Navigation, regulated foreign investments.¹¹¹ A treaty is a written agreement between states or between states and international organisations, operating within the field of international law.¹¹² The rules and procedure to be followed when entering into treaties, the interpretation of treaties and the termination of treaties are contained in the Vienna Convention on the Law of Treaties of 1969¹¹³ and the Vienna Convention on the Law of Treaties between states and International Organisations and between International Organisations of 1986.¹¹⁴

¹⁰³ *Ibid.*

¹⁰⁴ United Nations (Hereinafter referred to as the UN).

¹⁰⁵ Dugard J *International Law: a South African perspective* (2012) 25.

¹⁰⁶ *Ibid.*

¹⁰⁷ The *S.S. Lotus (France v Turkey)* PCIJ Series A, No.10 (1927) (hereinafter referred to as the *Lotus (France v Turkey)* case).

¹⁰⁸ The Permanent Court of International Justice (hereinafter referred to as the PCIJ).

¹⁰⁹ The *Lotus (France v Turkey)* case para 18.

¹¹⁰ Article 2(1)(a) of the Vienna Convention on the Law of Treaties (hereinafter referred to as the Vienna Convention).

¹¹¹ *Id* at 16.

¹¹² Dugard J *International Law: a South African perspective* (2012) 25.

¹¹³ The Vienna Convention on the Law of Treaties of 1969 (hereinafter referred to as the VC on the Law of treaties).

¹¹⁴ Dugard J *International Law: a South African perspective* (2012) 25.

These treaties dealt with the granting of reciprocal commercial privileges between the parties and their nationals.¹¹⁵ They afforded individuals protection of their properties, freedom of movement and the right to trade and engage in commercial enterprise.¹¹⁶ They also contained the Most Favoured Nation¹¹⁷ and the National Treatment principles.¹¹⁸ However, these treaty agreements were ambiguous and contained many uncertainties regarding investor protection and promotion.¹¹⁹

As a result, FDI was not always well-balanced. Post-World War II, international investment law is flawed. Firstly, it contains scattered treaty provisions, contested customs and questionable general principles of law.¹²⁰ Second, it fails to afford an investor the right to make a monetary transfer from the host state to another state.¹²¹

Third, the principles that existed at that time were vague and subject to many different interpretations.¹²² Finally, it does provide a foreign investor with effective mechanisms to pursue a claim against the host state, where the host state had not fulfilled its contractual obligations, resulting in a grievance on the part of the foreign investor.¹²³ This meant that the host state could unilaterally change contracts, which could result in the expropriation of the property of the foreign investor or force him to renegotiate the agreement.¹²⁴

Furthermore, when European traders travelled to the African and Asian continents to do business, the law of the host state did not apply to them, as they were under the law of their home countries wherever they went.¹²⁵ Therefore, when European traders immigrated to other countries, the domestic law of those countries did not apply to them.

¹¹⁵ Miles K *The origins of international investment law: Empire, environment and the safeguarding of capital* (2013) 24.

¹¹⁶ *Ibid.*

¹¹⁷ Most Favoured Nation Principle (hereinafter referred to as the MFN).

¹¹⁸ *Ibid.*

¹¹⁹ Salacuse J W "The treatification of international investment law" 2007 *Law and Business Review of America* 155.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Id* at 156.

¹²⁴ Salacuse J W *The Law of Investment Treaties* (2010) 78.

¹²⁵ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2012) 7.

This meant that their assets could not be expropriated or nationalised through local legislation of the host state. The European countries concluded treaties with Asian and African countries that confirmed this position.¹²⁶ In as much as this was generally an advantage, it also worked against the foreign investor, who could not benefit from the domestic laws of the host state.

States realised that there was a need for treaties that would provide procedural and substantive protection and promotion of foreign investments.¹²⁷ To overcome these problems, developed countries began a process of international investment treaties negotiations that would be complete, clear, specific and enforceable.¹²⁸ The negotiations of BITs started more than five decades ago when the Federal Republic of Germany and Pakistan signed the first BIT in 1959.¹²⁹

The Germany-Pakistan BIT¹³⁰ dealt with the scope of protection by defining protected investments, and provided state-to-state dispute resolution before the ICJ,¹³¹ or the arbitration tribunal.¹³² These two provisions can still be found in modern BITs. However, the Germany-Pakistan BIT did not provide for a dispute resolution mechanism between the foreign investor and the host state.¹³³ The Chad-Italy BIT first introduced dispute resolution between an investor and a host state in 1969.¹³⁴

In 1960, European countries led, by Germany negotiated BITs that dealt exclusively with FDIs, and that were aimed at creating a basic legal framework that will govern investments by nationals of one country in the territory of another country.¹³⁵ Shortly afterwards Switzerland, Italy, France, the United Kingdom, the Netherlands and

¹²⁶ *Id* at 8.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ Schefer K N *International Investment Law: Texts, Cases and Materials* (2013) 1.

¹³⁰ The Germany-Pakistan Bilateral Investment Treaty (hereinafter referred to as the Germany-Pakistan BIT <http://investmentpolicyhub.unctad.org/IIA/country/78/treaty/1732> (Date of use: 11 November 2015). This BIT has been replaced by the 2009 BIT.

¹³¹ The ICJ is the main judicial organ of the UN. The Court's role is to settle, in accordance with international law, legal disputes submitted to it by states <http://www.icj.org/court/index.php?p1=1> (Date of use: 11 November 2015).

¹³² Mestral A and L  vesque C (eds) *Improving International Investment Agreements* (2013) 16.

¹³³ *Ibid.*

¹³⁴ Mestral A and L  vesque C (eds) *Improving International Investment Agreements* (2013) 16.

¹³⁵ *Ibid.*

Belgium, also entered into what became known as the “first generation” BITs with specific developing countries.¹³⁶

The purpose of these BITs was to ensure that host countries are subject to international legal rules, and that foreign investors could lodge a claim in international arbitration against a host country that violated obligations contained in the BITs.¹³⁷ These treaties resulted in the fact that host states could no longer invoke national laws to avoid their international obligations arising from the notion of international minimum standards.¹³⁸

1.7 RESEARCH METHODOLOGY

This study is not empirical. Legislation, case law and international instruments serve as primary sources, while journal articles, academic writing and electronic resources are my secondary sources. Qualitative research is the focus of this dissertation.

1.8 BREAKDOWN OF CHAPTERS

The study consists of five chapters and is broken down as follows.

Chapter 1 is an introductory chapter.

Chapter 2 is an historic overview of the regulation of foreign investment in South Africa. It looks at the regulation of FDI before the development of BITs and at the South African economy during that period. This chapter further discusses the UK-SA BIT and the *Piero Foresti* case.

Chapter 3 discusses the protection of foreign investments in accordance with the South African law. It mainly focuses on domestic factors that may influence the FDI inflow.

Chapter 4 deals with the protection of FDI on the international level. It looks at different principles of international minimum standards of treatment. The following principles are discussed: the Most Favoured Nation, the National Treatment, the Fair and Equitable Treatment, and Full Protection and Security.

¹³⁶ The International Institute for Sustainable Development “Investment Treaties and the Search for Market Access in China” <https://www.iisd.org/itn/2013/06/26/investment-treaties-and-the-search-for-market-access-in-china/> (Date of Use: 16 May 2016).

¹³⁷ Salacuse J W *The Treatification of International Investment law* (2007) 156.

¹³⁸ Subedi S P “*International Investment Law: Reconciling Policy and Principle* (2012) 8.

Chapter 5 focuses *inter alia* on the impact that national laws such as the Protection of Investment Act and the Expropriation Bill¹³⁹ have on the economy of South Africa. It also looks at how international investment law affects the economy of South Africa.

Chapter 6 contains the conclusion and recommendations.

¹³⁹ The Expropriation Bill, 2015 (hereinafter referred to as the Expropriation Bill).

CHAPTER 2: THE OVERVIEW OF FOREIGN DIRECT INVESTMENT IN SOUTH AFRICA

2.1 INTRODUCTION

Although most scholars concentrate on the development of South African FDI during the 20th century, the development of FDI dates back many centuries.¹⁴⁰ The modern FDI is the product of a historical process that has passed through different phases. This chapter looks at the legal historic development of FDI in South Africa during the pre- and post-democracy periods.

2.2 THE GENERAL OVERVIEW OF FOREIGN DIRECT INVESTMENT IN SOUTH AFRICA DURING THE PRE-DEMOCRATIC ERA

Trevor Manuel, South Africa's former Minister of Finance, emphasised the importance of historical events that still influence the South African economy today. In a presentation in March 2007, he said:

“We can never fully escape the myriad of economic events, decisions, and systems that inform our history. They determine the structure of the economy that we have addressed over the past 12 years and with which we grapple today”.¹⁴¹

He continued:

“We must use ideas generated here and abroad to develop new paths that reach organically from our past into a future that is determined and shaped by our new democracy. So while the new must come from the old, the direction they take into our common future can and must be consciously influenced by us”.¹⁴²

During the pre-democratic era, South Africa was generally isolated from, and rejected by the international community, because of its apartheid legislation¹⁴³ South Africa had no international investment agreements with other states.¹⁴⁴ Most of its investments came from government expenditure on infrastructure, (roads, dams, railways,

¹⁴⁰ Schefer K N *International Investment Law: Texts, Cases and Materials* (2013) 3.

¹⁴¹ Manuel T A “Economic policy and South Africa's growth strategy” http://www.treasury.gov.za/comm_media/speeches/2007/2007031901.pdf (Date of use: 13 August 2015).

¹⁴² *Ibid.*

¹⁴³ South African History Online “South African history online” <http://www.sahistory.org.za/article/south-africas-foreign-relations-during-apartheid-1948> (Date of use: 18 April 2016).

¹⁴⁴ *Ibid.*

electronics, weaponries and agriculture).¹⁴⁵ It is important to look at how South Africa functioned during the pre-democratic era in order to understand the modern legal framework for FDI in South Africa today.

South Africa enacted legislation, regulations and policies that were aimed at regulating investments. The Bantu Investment Corporation Act¹⁴⁶ was enacted in 1951. The government established corporations to promote and encourage investments in the development of Bantu people in Bantu areas by encouraging existing Bantu undertakings, the promotion of new ones, the provision of capital, and by giving technical assistance and export advice.¹⁴⁷

In 1959, the ANC called for sanctions against the country, which fundamentally affected its economy. At the time, South African economy relied heavily on foreign capital, and was potentially vulnerable. The UN General Assembly passed its 1962 resolution, calling for a ban on exports to or imports from South Africa by three countries, namely, Britain, the United States of America and Japan.¹⁴⁸

Apart from the ANC and other opposition groups, the UN was also an outspoken opponent of South Africa's system of institutionalised racial segregation.¹⁴⁹ From 1964 until 1993, the UN led an international campaign encouraging states to take collective action against South Africa. Since the UN Security Council and General Assembly have repeatedly declared apartheid incompatible with international law and the UN Charter.¹⁵⁰ During the 1950s, the General Assembly made numerous appeals to South

¹⁴⁵ The DTI "why invest in South Africa"

https://www.thedti.gov.za/trade_investment/why_invest_insa.jsp (Date of use: 18 April 2016).

¹⁴⁶ Government Bantu Investment Corporation Act of 1961(hereinafter referred to as to as the Bantu Protection of Investment Act)

<http://www.aluka.org/stable/pdf/10.5555/al.sff.document.leg19590603.028.020.034> (Date of use: 07 April 2016).

¹⁴⁷ See the preamble of the Bantu Protection of Investment Act "To constitute a Corporation of objects of which is to promote and encourage industrial and other undertakings and to act as a development, financial and investment institution among Bantu persons in the Bantu areas, and to provide for other incidental matters" <http://www.aluka.org/stable/10.5555/al.sff.document.leg19590603.028.020.034> (Date of use 18 April 2016).

¹⁴⁸ Davis J "Squeezing apartheid"

<http://www.sahistory.org.za/sites/default/files/SQUEEZING%20APARTHEID,%20by%20Jennifer%20Davis.pdf> (Date of use: 13 November 2016).

¹⁴⁹ Frankel J "The legal and regulatory climate for investment in post-apartheid South Africa: an historical overview" 1998 *The Cardozo Journal of International and Comparative Law* 183.

¹⁵⁰ *Ibid.*

Africa to abolish its policy, declaring it a crime against humanity.¹⁵¹ The South African government responded by stating that apartheid was an internal affairs matter and fell beyond the scope of the UN.¹⁵² The result was economic sanctions, bringing about the isolation of South Africa from the international community.¹⁵³ In 1962, the UN requested member states to break diplomatic, trade and transport relations in an attempt to force South Africa to abolish apartheid.¹⁵⁴ The United Nations General Assembly declared the year 1982 the International Year of Mobilization for Sanctions against South Africa.¹⁵⁵

Despite sanctions, South Africa continued to be regarded as a favourable investment destination and still attracted billions of dollars in foreign investments.¹⁵⁶ This was the result of apartheid policies that ensured investors cheap labour, rapid expansion and high returns. Between 1956 and 1969, foreign investment in South Africa rose from R2 790 million to R4 990 million.¹⁵⁷ The average returns during those years increased from 9 to 16 per cent.¹⁵⁸ Then, around 1980, the apartheid policy was scrutinised yet again, resulting in foreign companies disinvesting their assets, citing inflation and recession as a reason.¹⁵⁹

In 1986, the USA, influenced by the UN Security Council, passed the Comprehensive Anti-Apartheid Act,¹⁶⁰ restricting its nationals from entering into new business deals in South Africa.¹⁶¹ The UN Security Council is empowered by the Charter of the United

¹⁵¹ *Ibid.*

¹⁵² The South African History Online "South Africa's Foreign Relations during Apartheid, 1948" <http://www.sahistory.org.za/20th-century-south-africa/south-africas-foreign-relations-during-apartheid-1948> (Date of use: 09 December 2015).

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ Tailor E "The history of foreign investment and labor law in South Africa and the impact on investment on Labour Relations Act 66 of 1995" 1996 *The Transnational Lawyer* 617.

¹⁵⁷ Duru J O "The dilemma of foreign investment in South Africa" 1971 *The American Society of International Law Proceedings* 303.

¹⁵⁸ *Ibid.*

¹⁵⁹ Tailor E "The history of foreign investment and labor law in South Africa and the impact on investment on Labour Relations Act 66 of 1995" 1996 *The Transnational Lawyer* 617.

¹⁶⁰ The Comprehensive Anti-Apartheid Act of 1986 (hereinafter referred to as the (CAAA) <https://www.congress.gov/bill/99th-congress/house-bill/4868> (Date of use: 05 April 2016).

¹⁶¹ *Nagan W P* "An appraisal of the Comprehensive Anti-Apartheid Act of 1986" 1987 *The Journal of Law and Religion* 329.

Nations¹⁶² to institute economic sanctions against any state that poses a threat to international peace.¹⁶³

This led to 214 out of 324 US companies withdrawing their businesses from South Africa.¹⁶⁴ The UN Security Council further called on members to introduce more far-reaching economic measures against the country, but a draft resolution of selective sanctions was vetoed by the UK and the USA in 1988.¹⁶⁵

By 1989, South Africa's economy had suffered immensely as a result of disinvestments and international capital boycotts,¹⁶⁶ which put pressure on the government to end its apartheid policies in order to regain the friendly investment environment it had enjoyed in the 1950s. South Africa had to adapt its laws and investment regulations in order not to be completely isolated from the global economy.

During the pre-democratic era, South Africa's FDI was affected by complex foreign exchange control policies such as the South African Exchange Control Regulation.¹⁶⁷ The SAECR was controlling South Africa's currency reserves and its purpose was to mobilise and centralise the supervision of the country's gold and foreign exchange resources, ensuring that these were utilised for the benefit of the country and to regulate payment of imports and loans. Furthermore, the South African government implemented strict foreign exchange controls to regulate the flow of funds in and out of the country.¹⁶⁸

¹⁶² The Charter of the United Nations and the Statute of the International Court of Justice, 1945 (hereinafter referred to as the UN Charter) <https://www.google.co.za/#q=un+charter> (Date of Use: 15 April 2016).

¹⁶³ Article 25 of the UN Charter.

¹⁶⁴ Tailor E "The history of foreign investment and labor law in South Africa and the impact on investment on Labour Relations Act 66 of 1995" 1996 *The Transnational Lawyer* 617.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ The South African Exchange Control Regulation of 1961 (hereinafter referred to as the SAECR).

¹⁶⁸ Frankel J "The legal and regulatory climate for investment in post-apartheid South Africa: an historical overview" 1998 *The Cardozo Journal of International and Comparative Law* 183.

2.3 THE BILATERAL INVESTMENT TREATIES ERA IN SOUTH AFRICA

2.3.1 The Conclusion of Bilateral Investment Treaty

The global governance system for FDI is made up of a complex network of international investment agreements that are usually concluded on a bilateral basis.¹⁶⁹ Since the beginning of the democratic era in 1994, South Africa has attempted to monopolise FDI through domestic laws, international investment agreements and policies.¹⁷⁰ The country underwent a drastic transformation by abolishing the socio-economic, political and legal structure of the apartheid regime.

Post-democracy South Africa reviewed some of its laws, policies and regulations with a purpose of re-entering the international community. For example, it began to conclude BITs aimed at protecting and promoting FDI in South Africa. BITs can be described as hard law as they delegate the authority of interpretation and implementation to trans-national arbitration bodies.¹⁷¹ They notably grant foreign investors direct legal personality under international law.¹⁷²

As a result, South Africa became an investor-friendly jurisdiction for foreign investments, thereby improving the economy. South Africa offered several advantages for investing in the country, some of which being an unrivalled transport and telecommunication infrastructure, rich mineral resources, and a diverse manufacturing industry.

At present, out of the 40 BITs that were concluded in the past, only 17 are still in force.¹⁷³ On the other hand, China, a developing country and a BRICS member country with a high Gross Domestic Product (GDP) has more than 108 BITs in place.¹⁷⁴

¹⁶⁹ Berger A “China’s new bilateral investment treaty programme: Substance, rational and implications for international investment law making” https://www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf (Date of use: 29 September 2016).

¹⁷⁰ Langalanga A “Imagining South Africa’s foreign investment regulatory regime in a global context” 2015 *SAIIA Economic Diplomacy Programme: Occasional Paper* 6.

¹⁷¹ Berger A “China’s new bilateral investment treaty programme: Substance, rational and implications for international investment law making” https://www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf (Date of use: 29 September 2016).

¹⁷² *Ibid.*

¹⁷³ UNCTAD “Number of IIAs per economy” <http://investmentpolicyhub.unctad.org/IIA/liasByCountry#iialInnerMenu> (Date of use: 27 March 2016).

¹⁷⁴ *Ibid.*

The Constitution makes provision for the conclusion of international agreements. In terms of section 231(1) of the Constitution,¹⁷⁵ the national executive is responsible for negotiating and concluding international agreements. However, both the National Assembly¹⁷⁶ and the National Council of Provinces must approve them,¹⁷⁷ unless they fall within the scope of the exception in section 231(3) of the Constitution.¹⁷⁸

The National Executive has delegated the power to negotiate and conclude international trade agreements with the DTI and the Department of International Trade and Economic Development.¹⁷⁹ On the other hand, the DTI has been delegated the responsibility to formulate and implement international agreements. Together, these two government departments play an important role with regard to the economic development in South Africa.

Although the BIT regime was already in 1959 amongst international investments communities, South Africa only signed its first BIT in 1994.¹⁸⁰ Since then, the country has entered into many different BITs, the first being with Germany, Switzerland and the Netherlands.

¹⁷⁵ Section 231 of the Constitution provides that: (1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

¹⁷⁶ National Assembly (hereinafter referred to as the NA).

¹⁷⁷ National Council of Provinces (hereinafter referred to as the NCOP).

¹⁷⁸ See s 231(3) of the Constitution provides that "An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time".

¹⁷⁹ Department of International Trade and Economic Development *Hereinafter referred to as the DITED).

¹⁸⁰ UNCTAD "Number of IIAs per economy"

<http://investmentpolicyhub.unctad.org/IIA/liasByCountry#iialInnerMenu> (Date of use: 22 May 2015).

In the past, BITs were generally concluded between developed and developing states.¹⁸¹ However, today BITs can be concluded between developed as well as developing countries. By the end of 2015, more than 3 000 BITs were concluded between various countries using a pre-determined treaty template,¹⁸² containing the guidelines, and the number is still increasing.¹⁸³

Entering into BITs offer many advantages for the host state, foreign investment may bring the advancement of employment, resources, technologies, telecommunication, transport networks, energy production systems and skills. A further advantage is that they may create a nexus between international markets and the host state.

Statistics show that from 2002 and 2008, South Africa's economy grew at an average of 4.5 per cent year-on-year, which has been the largest economic growth since the establishment of democracy in 1994.¹⁸⁴

However, as a result of factors such as the widening gap between rich and poor, a low-skilled labour force and a high unemployment rate, deteriorating infrastructure, automotive strikes, high corruption, high crime rates and a change in the regulation of FDI, the country's economic growth has been slow, and below the African average in 2014 and 2015.¹⁸⁵ South Africa's economy grew by 1.5 per cent in 2014.¹⁸⁶ In 2015, South Africa experienced severe drought conditions that had a considerable impact on the economy.¹⁸⁷ This led to a decrease of 0.2 per cent of the country's GDP landing it on 1.3 per cent in 2015.¹⁸⁸ In the first quarter of 2016, South Africa's economy further declined by 1.2 per cent.¹⁸⁹

¹⁸¹ Salacuse J W "The growth of Bilateral Investment Treaties and their impact on foreign investments in developing countries" 1990 *The International Lawyer* ABA 655.

¹⁸² Salacuse J W *The Treatification of International Investment Law* (2007) 156.

¹⁸³ Masamba M "Africa and Bilateral Treaties: to BIT or not"

http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1697:africa-and-bilateral-investment-treaties-to-bit-or-not&catid=82:african-industry-a-business&Itemid=266 (Date of use: 19 March 2016).

¹⁸⁴ Trading Economics "South Africa GDP Growth Rate 1993-2015"

<http://www.tradingeconomics.com/south-africa/gdp-growth> (Date of use: 24 August 2015).

¹⁸⁵ *Ibid.*

¹⁸⁶ Statistics South Africa "Growth domestic product: fourth quarter 2015"

<http://www.statssa.gov.za/?p=6233> (Date of use: 05 July 2016).

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ Statistics South Africa "Growth domestic product: first quarter 2016"

http://www.statssa.gov.za/?page_id=1854&PPN=P0441 (Date of use: 05 July 2016).

The South African government, the DTI and the Department of International Relations and Cooperation, after a three-year investment policy review process, took a decision to terminate the BITs with foreign states and introduced the Promotion and Protection of Investment Bill¹⁹⁰ in November 2013¹⁹¹ and promulgated the Protection of Investment Act 22 of 2015.¹⁹² The BITs with most European countries have already been terminated. At present, South Africa has only three BITs with SADC member states in place out of 15. However, the BITs with three BRICS member countries, Russia, India and China are still in force.¹⁹³

One reason for terminating these BITs is that the Protection of Investment Act updates and modernises South Africa's legal framework for foreign investments,¹⁹⁴ while increasing the protection and promotion of both domestic and international investments. Another is that they were close to their termination dates and would otherwise have been automatically extended in terms of their renewal clauses.

For example, the South Africa-Germany BIT¹⁹⁵ contains a twelve-month notice period with a run-off protection for existing protected investments of twenty years,¹⁹⁶ while the SA-Netherlands BIT¹⁹⁷ contains a six-month notice period with a ten-year automatic renewal period and a fifteen-year run-off period for investments made before the termination date.¹⁹⁸ The South Africa-United Kingdom BIT¹⁹⁹ contains a twelve month

¹⁹⁰ The Promotion and Protection of Investment Bill, 2013 (hereinafter referred to as the Investment Bill). <http://www.tralac.org/files/2013/11/Promotion-and-protection-of-investment-bill-2013-Invitation-for-public-comment.pdf> (Date of use: 13 April 2016).

¹⁹¹ Hurt S "Why South Africa is cancelling foreign investment deals" <http://www.economywatch.co.za/south-africa-cancelling-foreign-investment.02-01.html> (Date of use: 23 October 2015).

¹⁹² The Protection of Investment Act was gazetted on the 15 of December 2015.

¹⁹³ UNCTAD "Number of IIAs per economy"

<http://investmentpolicyhub.unctad.org/IIA/liaByCountry#iialInnerMenu> (Date of use: 22 May 2016).

¹⁹⁴ Steyn P "The new Promotion and Protection of investment Bill for local and foreign investors in South Africa" <http://www.polity.org.za/article/the-new-promotion-and-protection-of-investment-bill-an-assessment-of-its-implications-for-local-and-foreign-investors-in-south-africa> (Date of use: 21 October 2014).

¹⁹⁵ South Africa-Germany Bilateral Investment Treaty, Treaty Series No: 33 of 1961

<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1416> (Date of use: 17 April 2016).

¹⁹⁶ Mossallam M "Process matters: South Africa's experience exiting its BITs" (*University of Oxford: The Global Economic Governance Programme* 2015)13.

¹⁹⁷ South Africa-Netherlands Bilateral Investment treaty (hereinafter referred to as the SA-Netherlands BIT) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2082> (Date of use: 17 April 2016).

¹⁹⁸ Articles 14(2) and 14(3) of the SA-Netherlands BIT.

¹⁹⁹ South Africa-United Kingdom Bilateral Investment Treaty, Treaty Series 35 of 1998 (hereinafter referred to as the SA-UK BIT) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2280> (Date of use: 17 April 2016).

application period after the notice of termination and a twenty-year run-off protection period for existing investments.²⁰⁰

According to the Minister of Trade and Industry, the Protection of Investment Act will provide “adequate protection to all investors, including foreign investors”, and it will ensure that “South Africa’s constitutional obligations, like sustainable development,²⁰¹ are upheld, while allowing government to retain the policy space to regulate in the public interest”.²⁰² He further argues that there is no connection between the growth of South Africa’s economy and the BITs,²⁰³ although some of these countries are South Africa’s largest trading partners.²⁰⁴

Although the BITs come with numerous benefits, they also create obligations for the host state. Therefore, the provisions of the BITs are important in this regard. Most BITs contain five core state obligations, namely, fair and equitable treatment; security and protection; national treatment; most favoured nation; and/or expropriation.²⁰⁵

2.4 THE DISCUSSION OF THE UNITED KINGDOM-SOUTH AFRICA BILATERAL INVESTMENT TREATY

The UK-SA BIT²⁰⁶ was the first BIT that South Africa concluded in the post-democracy era with another country and it was used as a template for the BIT’s subsequently concluded. It is, therefore, important to discuss briefly the provisions of the UK-SA BIT, in order to provide a background as to why South Africa decided to embark on the investment policy review process, and the consequences that such a review might have for the country’s economy. However, not all the provisions of the UK-SA BIT will be discussed, but only those common to all the BITs between South Africa and other countries.

²⁰⁰ Article 14 of the SA-UK BIT.

²⁰¹ See s 2 of the Constitution.

²⁰² SAGNA “Bill to help modernise SA’s investment regime: Davies” <http://www.sanews.gov.za/south-africa/bill-help-modernise-sas-investment-regime-davies> (Date of use: 24 April 2015).

²⁰³ *Ibid.*

²⁰⁴ Forde F “Investment Bill: Thick as a Brics?”

<http://www.financialmail.co.za/fmfox/2015/11/12/investment-bill-thick-as-a-brics> (Date of use: 16 November 2015).

²⁰⁵ Please note that these principles will be dealt with in detail in chapter 3 below.

²⁰⁶ The United Kingdom- South Africa BIT <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195> (Date of use: 16 May 2016).

2.4.1 Article 1: Definitions

The definition of investment may vary from one BIT to another. The definition determines the subject matter of the agreement,²⁰⁷ and it may influence the flow of the FDI. Although each BIT is structured differently, most BITs contain common provisions, as states normally use templates when negotiating and drafting the BITs.

Article 1 of the UK-SA BIT defines the meaning and scope of transactions that can be regarded as investment. In terms of article 1(a), investments include movable and immovable assets; shares and stock of a company; claims of money or any performance in terms of a contract that has a financial value; intellectual property rights, goodwill, technical processes and skills; and business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

2.4.2 Article 2: The promotion and protection of investment

Article 2 deals with the promotion and protection of investment. It requires both contracting states to the BIT to encourage and create favourable conditions for nationals or companies of both contracting states to invest capital, and for the admission of investments in their respective territories.²⁰⁸ The contracting states are required to accord fair and equitable treatment to foreign investors who are nationals of the contracting states.²⁰⁹

2.4.3 Article 3: National Treatment and Most Favoured-Nation Treatment

This part of the UK-SA BIT sets out the treatment of foreign investment under article 3. Article 3 prohibits discrimination of foreign investors by the host state. Both contracting states are required to treat foreign investors as though they were nationals of the host state. The host state is also required to accord investors of the contracting state the same treatment that it accords its own investors and foreign investors of a third party.²¹⁰

²⁰⁷ ChaisseJ and Bellak C “Navigating the expanding of international treaties on foreign investment: creation and use of critical index” 2015 *Journal of International Economic Law* 88.

²⁰⁸ Article 2(1) of the UK-SA BIT.

²⁰⁹ *Id* at 2(2).

²¹⁰ *Id* at 3(1).

This is a provision under which FDI law accords aggrieved investors the right to sue host states for any new legislation or government action that alters, in an unreasonable or discriminatory manner, the conditions under which their investments have been made.

2.4.4 Article 4: Compensation for losses

The article stipulates as to how foreign investors are to be compensated in case of loss. In terms of this provision, a foreign investor may be compensated for losses that ensued as a result of war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the host state.²¹¹ The aggrieved foreign investor can claim either restitution or indemnification. Furthermore, compensation for loss must be effected without prejudice.²¹² Therefore, in terms of this provision, market value is taken into account, and investors are unlikely to receive less compensation than they are entitled to.

2.4.5 Article 5: Expropriation

Expropriation often forms a core provision of the BITs, especially since the protection against expropriation was the main reason for concluding the first generation BITs.²¹³ This is one of the provisions that act as a blanket for foreign investors. It protects foreign investment from expropriation by the host state. Under FDI law, the aggrieved foreign investors may claim compensation for the expropriation of their investments. Article 5 requires the host state to refrain from nationalising or expropriating assets of the foreign investors in their respective countries, unless the expropriation is for a public purpose.²¹⁴

Where expropriation is necessary, the host state must ensure that the compensation is prompt, adequate and effective.²¹⁵ This precludes the host state from discounting the value of the investment by reference to the purpose of the expropriation. It is

²¹¹ *Id* at 4(1).

²¹² *Id* at 4(2).

²¹³ Diehl A *The Core Standards of International Investment Protection* (2012) 79.

²¹⁴ Article 5(1) of the UK-SA BIT.

²¹⁵ *Id* at 5(1).

unusual for a state to openly expropriate property belonging foreign investors. For this reason, the most common forms of expropriation is indirect expropriation.²¹⁶

2.4.6. Article 6: Repatriation of investment and returns

This provision allows for flexible investments. Article 6 guarantees foreign investors the unrestricted transfer of and returns on their investments. It requires the host state to transfer investments without delays, and to use the convertible currency in which the capital was originally invested, or any other convertible currency agreed to by the investor and the host state concerned.²¹⁷

2.4.7 Article 8: Settlement of dispute between an investor and a host state

The UK-SA BIT makes provision for the settlement of investment disputes. It distinguishes between the state-investor dispute resolution and the dispute between the contracting states. However, only the investor-state dispute resolution will be discussed here. In terms of this provision, foreign investors have a right to initiate lawsuits directly against host states.²¹⁸ For example, the aggrieved foreign investor who has a dispute with the South African government relating to foreign investments within South Africa, has recourse to any international arbitration or other neutral forum to resolve the dispute.²¹⁹

The aggrieved foreign investor is afforded different channels via which to submit a claim against the host state. For example, the aggrieved foreign investor may submit a claim either to international arbitration, ICSID, the Court of Arbitration of the International Chamber of Commerce,²²⁰ or an *ad hoc* arbitration tribunal. In the past two decades, foreign investors have approached investment arbitral tribunals to challenge state regulations that were interfering with their rights.²²¹

Although the UK-SA BIT has many flaws, South Africa used it a guideline when concluding subsequent BITs. This means that South Africa incorporated the flaws in

²¹⁶ Article 6 of the UK-SA BIT.

²¹⁷ *Id* at 6(1).

²¹⁸ Article 8(1) of the UK-SA BIT.

²¹⁹ *Ibid*.

²²⁰ Court of Arbitration of the International Chamber of Commerce (hereinafter referred as the CAICC).

²²¹ Choudhury B "Democratic implications arising from the intersection of investment arbitration and human rights" 2009 *The Alberta Law Review* 984.

the UK-SA BIT. For this reason, Africa attempted to remedy this problem by reviewing its foreign investment legal framework.

2.5 THE DISCUSSION OF THE *PIERO FORESTI* CASE

2.5.1 The facts of the case

The *Piero Foresti*²²² case dealt with the mining interests owned by a group of European investors namely, Piero Foresti, and Laura de Carli who had investments in South Africa. The South African government was the respondent in this arbitration. The proceedings were initiated by the Italian investors who were claimants, under Article 8 of the Italy-SA BIT²²³ and Article 10 of the Luxembourg-SA BIT, respectively.²²⁴ The claimants submitted their claims to arbitration, in accordance with the rules of the facility of the ICSID.

Taking cognisance of the fact that the Italian investors held some of their assets indirectly through a Luxembourg incorporated company, they lodged parallel claims under the Luxembourg-SA BIT, the reason being that the provisions of the Luxembourg-SA BIT are identical in substance to those of the Italy-SA BIT. As a result, it was convenient for the matters to be heard concurrently.

2.5.2 The issue before the court

The court had to decide whether the coming into operation of the Mineral and Petroleum Resource Development Act²²⁵ resulted in a direct and/or indirect expropriation of the assets of the claimants.

2.5.3 The claimants' claims and arguments

The claimants alleged that South Africa was in breach of Articles 5 of both BITs. Firstly, they alleged that the coming into effect of the MPRDA extinguished certain putative old

²²² The *Piero Foresti, Laura De Carli v Republic of South Africa* ICSID case No ARB (AF) /07/1 <http://www.italaw.com/cases/446> (Date of use: 15 December 2015).

²²³ Italy-South Africa Bilateral Investment Treaty, 1999 (Hereinafter referred to as the Italy-SA BIT). <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3216> (Date of use: 18 April 2016).

²²⁴ The Luxembourg- South Africa Bilateral Investment Treaty, 1998 (hereinafter referred to as the Luxemburg-SA BIT) <http://investmentpolicyhub.unctad.org/IIA/country/122/treaty/537> (Date of use: 17 April 2016).

²²⁵ The Mineral and Petroleum Resource Development Act (hereinafter referred to as the MPRDA).

order mining rights²²⁶ held by the claimants. Therefore, the MPRDA brought an end to the old order mineral law by repealing the common law as its principles are in conflict with the MPRDA.²²⁷

Secondly, that the coming into effect of the MPRDA, when combined with the Mining Charter,²²⁸ the South African Chamber of Mines, the National Union of Mineworkers,²²⁹ and the South African Mineral Development Association²³⁰ is an attempt to encourage greater ownership of mining industry assets by historically disadvantaged South Africans.²³¹ In this regard they challenged the international legality of the Broad-based Black Economic Empowerment Act.²³²

Lastly, they alleged that the old order mining rights associated with fifty properties affecting twenty-five quarries have been directly expropriated against a measure of compensation that is still pending. They further alleged that even if the amount of compensation had been determined, it would still not satisfy the standards for compensation required under both the Italy-SA BIT and the Luxembourg-SA BIT.²³³

With regard to these allegations, the claimants made the following arguments: firstly, that the MPRDA and the Mining Charter breached the respondent's Fair and Equitable Treatment and National Treatment obligations under the Italy-SA and Luxembourg-SA BITs.²³⁴ Secondly, that the two BITs by virtue of the Most Favoured Nations clauses provided them with protection from direct and indirect expropriation, measures having

²²⁶ The old order mining rights refers to any mining lease, consent to mine, permission to mine, claim licence, mining authorisation or right listed that were in force before the MPRDA came into force. See Schedule II of the MPRDA.

²²⁷ Choudhury B "Democratic implications arising from the intersection of investment arbitration and human rights" 2009 *The Alberta Law Review* 656.

²²⁸ Mining Charter of 2004 (hereafter referred to as the Mining Charter).

²²⁹ The National Union of Mineworkers (hereinafter referred to as the NUM).

²³⁰ The South African Mineral Development Association (hereinafter referred to as the SAMDA).

²³¹ *The Piero Foresti, Laura De Carli V Republic of South Africa* ICSID case No ARB (AF)/07/1 para 54. <http://www.italaw.com/cases/446> (Date of use: 15 December 2016).

²³² The Broad –Based Black Economic Empowerment Act 53 of 2003 (hereinafter referred to as the Black Economic Empowerment Act) https://www.environment.gov.za/sites/default/files/legislations/bbbee_act.pdf (Date of use: 7 April 2016).

²³³ *Id* at 62.

²³⁴ *Id* at 78.

an effect equivalent to expropriation and measures limiting permanently or temporarily investors' rights of ownership, possession, control or enjoyment of the investments.²³⁵

The claimants argued that their rights have been expropriated in the following two ways. First, that the old order mining rights associated with forty-four properties affecting twenty-one quarries have been effectively, definitively and directly or indirectly expropriated because, at the end of the conversion process, no new order right has been granted and therefore, no compensation has been granted.²³⁶ Second, that the old order mining rights associated with five properties affecting four quarries have been directly expropriated against a measure of compensation that fails to satisfy the standards for compensation required under both BITs.²³⁷

They further argued that if these cases did not amount to direct expropriations, then they were indirect and/or partial expropriations and/or inequivalent measures taken against inadequate compensation.²³⁸

In support of their arguments, the claimants relied on Articles 5(1) and 5(2) in both BITs.²³⁹ For an expropriation to be valid, it,

- (i) must be “for public purposes or in the national interest” or “for a public purpose related to the internal needs of the country”;
- (ii) must be on a non-discriminatory basis;
- (iii) the compensation must be prompt, adequate and effective; and
- (iv) must be undertaken “under due process of law”.²⁴⁰

2.5.4 The respondent's arguments

With regard to the claimants' allegations in the memorial, the respondent argued that assuming, for argument's sake that the claimants have a valid claim for expropriation

²³⁵ *Id* at 57.

²³⁶ *Id* at 60.

²³⁷ *Id* at 61.

²³⁸ *Ibid*.

²³⁹ These two provisions contain requirements for lawful expropriation.

²⁴⁰ *The Piero Foresti, Laura De Carli v Republic of South Africa* ICSID case No ARB (AF)/07/1 para 58.

of the old order mineral rights, the expropriation was lawful under both BITs and therefore, the respondent did not breach the BITs as alleged by the claimants.²⁴¹

They gave the following reason for this argument: that the two BITs permit South Africa to expropriate investments provided that the expropriation meets the requirements for expropriation contained in both BITs.²⁴² They further argued that the alleged expropriation of old order mineral rights were undertaken for multiple and important public purposes, and that the claimants had conceded as much in their memorial.²⁴³

The respondent pointed out that that the MRPDA and the Mining Charter were promulgated for the purpose of:

- (i) “simplifying and modernizing an overly complex legal system;
- (ii) ameliorating the disenfranchisement of historical disadvantaged South Africans and from the Mineral Act;²⁴⁴
- (iii) reducing the economically harmful concentration of mineral rights and promoting the optimal exploitation of mineral resources; and
- (iv) protecting the environment and the communities living close to mining operations”.²⁴⁵

The respondent further argued that, with respect to compensation, the obligation to provide immediate or prompt compensation is met where: first, the state provides the investor without undue delay, with access to an effective mechanism for the determination whether compensation is due, and if so, the amount required. Second, should the mechanism determine that compensation is due, it is paid within a short time after the amount has been fixed with interest, taking to account the value of money at that time?²⁴⁶

²⁴¹ *Id* at para 67.

²⁴² *Id* at para 68.

²⁴³ *Id* at para 69.

²⁴⁴ The Minerals Act 50 of 1991 (hereinafter referred to as the Mineral Act).

http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0ahUKEwiZ9oSO4prMAhWHL8AKHYEjDoAQFgg4MAQ&url=http%3A%2F%2Fsoer.deat.gov.za%2Fdm_documents%2FMineralsAct50of1991_zJ7qk.pdf&usq=AFQjCNFYvXljo44oGKNYhQzMgsMzI7rpew&sig2=mwRTwlaQRIU4jKpm4Yf_yg&bvm=bv.119745492,d.d24 Date of use: 17 April 2016).

²⁴⁵ *The Piero Foresti, Laura De Carli V Republic of South Africa* ICSID case No ARB (AF)/07/1 para 69.

²⁴⁶ *Id* at para 70.

The respondent further argued that the Mining Charter's divestment requirements treated all investors, whether South African or foreign, equally.²⁴⁷ Moreover, the respondent argued that even if the Mining Charter were found to treat foreign investors differently from South African investors, the difference in treatment would fall well within the requirement of advancing critical public interests.²⁴⁸

The respondent argued further that there was no direct expropriation of the old order mineral rights. The respondent pointed out that direct expropriation requires the complete deprivation of all rights enjoyed by the investor along with transfer of ownership.²⁴⁹ In this regard, it was argued that neither complete deprivation nor transfer of ownership can be shown in this case because the operating companies have retained the same core entitlement to prospect or mine granite on an exclusive basis under a different name.²⁵⁰

As regards indirect expropriation, the respondent argued that there was no indirect expropriation for three reasons. Firstly, a non-discriminatory regulation such as the one in issue before the tribunal cannot be expropriation without a prior promise that the regulation would not be adopted in future.²⁵¹ Second, that there can be no indirect expropriation unless the investor has been substantially deprived of his/her rights in the investment.²⁵² Lastly, there can be no indirect expropriation where the government action in question is a rational and proportional means of pursuing legitimate public regulatory purposes.²⁵³

2.5.5 The decision of the court

The case was not finalised as anticipated, because on 2 November 2009, the claimants sought the respondent's consent to discontinue the proceedings in accordance with Article 50 of the Additional Facility Rules.²⁵⁴ The claimants argued that, although they had not been provided with full relief for their alleged injuries, they nevertheless sought

²⁴⁷ *Id* at para 72.

²⁴⁸ *Ibid.*

²⁴⁹ *Id* at para 74.

²⁵⁰ *Ibid.*

²⁵¹ *Id* at para 75.

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ *Id* at para 79.

discontinuance, because on 12 December 2008, the respondent granted the claimants new order mineral rights without requiring the claimants to sell 26 per cent of their shares to historically disadvantaged South Africans.²⁵⁵

The parties agreed that the operating companies would be deemed to have complied with the Mining Charter by declaring 21 per cent of the stone mined a beneficiation offset in South Africa, and providing a 5 per cent employee ownership programme for employees of the claimants.²⁵⁶ The claimants informed the respondent and the tribunal that they were willing to agree to discontinuance with an award dismissing their claims with *res judicata* effect.²⁵⁷ The discontinuance of the case was granted.

2.5.6 The critical analysis of the *Piero Foresti* case

Conflicts may arise as to the rights of foreign investors and the rights of the host state. For example, economic conditions may change within states and alter both the feasibility and the content of existing laws and policies. Generally, investment agreements are premised on a reciprocal relationship between the foreign investor and the host state. The foreign investors establish investments that create more favourable economic conditions in the host state, while the host state protects the investments within its territory.²⁵⁸

Aligning the rights of investors and those of the host state has been a long-standing practice and can be complicated. How does one balance the scale between the rights of the host state and those of the foreign investor? One may argue that the host state is entitled to protect its citizenry like in the *Piero Foresti* case. However, when a developing country such as South Africa relies heavily on FDI for economic development, the rights of foreign investors may not be ignored.

It must be remembered that, at times, these two interests may be in conflict with one another. This is because states allow foreign investments to improve economic

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ Claimants' Reply to Respondent's Response to Claimants' Request for Discontinuance and Application for Default Award (26 Jan 2010) (the "Reply"), para 13.22

²⁵⁸ Choudhury B "Democratic implications arising from the intersection of investment arbitration and human rights" 2009 *The Alberta Law Review* 984.

development in the host state, while foreign investors invest in another country to enhance their own competitiveness and market share.²⁵⁹ This may lead to investment disputes between the host state and the foreign investors as seen in the *Piero Foresti* case.

Although the claimants did not succeed, the case prompted South Africa to embark on an investment policy review process in 2010. The policy review process was an attempt to identify loopholes in the BITs that South Africa had concluded, and to decide whether to continue with BITs as instruments to regulate FDI. South Africa felt that the scope of the first generation BITs is too wide, and may lead to many foreign investment disputes in future. South Africa realised a need to limit the scope of international law on foreign investments, while at the same time promoting foreign investments in South Africa.

The *Piero Foresti* case was the first case to confront the regulation of FDI in South Africa in the post-1994 era in a direct manner. As much as this is a new development in the regulation of FDI in South Africa, it also raises the question as to whether the termination of the first-generation BITs is an adequate solution. Understandably, there may indeed be a need to review foreign investments policies. However, the outcome of the review is what concerns foreign investors. Did South Africa look at other options to remedy the concerns with regard to the first generation BITs?

The purpose of affirmative action policies in South Africa is to achieve equality and to rectify the inequalities and injustices created by the apartheid government before 1994. South Africa generally has an obligation to advance the interests of its nationals, while promoting foreign investment in order to fulfil constitutional obligations for securing sustainable economic development. A balance needs to be created between the interests of the nationals of a host state and the interest of the foreign investors.

On the other hand, foreign investors have a right to protection of their investment by the host state. Article 31(3)(c) of the Vienna Convention on the Law of Treaties require states to take into account any relevant rules of international law applicable in the

²⁵⁹ *Ibid.*

relations between the parties". Therefore, when solving FDI disputes the tribunal should have regard to international investment law and the rules of international law that are closely connected to the investments.

2.6 CONCLUSION

The importance of the historic overview of FDI in South Africa has been discussed. Certain provisions of the UK-SA BIT have also been highlighted in order to provide the background of the new approach to the regulation of foreign investment. The *Piero Foresti* case has prompted the South African government to scrutinise its first generation BIT regime.

CHAPTER 3: THE DETERMINANTS OF THE FOREIGN DIRECT INVESTMENT INFLOW IN SOUTH AFRICA

3.1. INTRODUCTION

It is now generally recognised that both government institutions and the law play an important role in increasing economic growth. The South African economy had been growing strongly in the ten years since 2002. However, it has deteriorated since 2015. This prompts the question: what has gone wrong and how can this be fixed? South Africa needs to look back in order to find a way forward.

The list of factors that affect FDI inflows is not exhaustive. There are many different factors that play a role in the flow of FDI. These factors cannot be isolated from each other because they collectively affect the FDI inflow, which also depends on the type of industry. For example, the manufacturing industry FDI and low wages play an important role, because it is a labour intensive industry in nature. These factors affect all three main economic sectors, namely, the extraction, manufacturing and service sectors.

In the preceding chapters, the legal and policy regulatory environment and the FDI protection as determinants of FDI inflow have been discussed. Furthermore, some of the factors that influence the FDI inflow have already been discussed in the preceding chapters and will therefore, not be covered in this chapter. Instead, the following factors will be discussed here: the country's governance and political stability; constitutional right to property; potential economic growth; the rule of law; exchange rate considerations; openness and transparency of the government; and the size of the population.

3.2 COUNTRY GOVERNANCE AND POLITICAL STABILITY

The political stability of a country is of major importance because its governance style may have an impact on its perceived stability.²⁶⁰ Factors such as the frequency of changes in government, political tolerance, good governance, corruption levels, transparent regulatory frameworks, and public institutions all play an important role in determining FDI inflow.²⁶¹

²⁶⁰ Luiz J M & Charalambous H "Factors influencing foreign direct investment of South African financial services firms in Sub-Saharan Africa" 2009 *International Business Review* 313.

²⁶¹ *Ibid.*

Based on the study by Luiz and Charalambous, this factor was rated between 4 and 5, with 1 being less important and 5 being extremely important.²⁶² Furthermore, this factor affects all aspects of a country, especially its economy, and it provides for conditions that allow growth and development of both local and international markets.²⁶³ Without a stable political environment, it is difficult to predict or rely on a sustainable long-term growth prospect, which FDIs critically depend on.²⁶⁴

The lack of leadership on issues such as the appointment of political officials in both developed and emerging economies affecting structural reform will undermine prospects for growth and new opportunities for investors, which may negatively affect the FDI inflow.²⁶⁵

In 2015, Mathews Phosa, in his presentation at the Austrian Business Chamber AGM, admitted that South Africa lacks political stability.²⁶⁶ He named four areas where this was lacking namely:

- a) inconsistencies in land reform and land ownership laws;
- b) the BEE policies that are often challenged and inconsistent create a wrong impression to the investment community;
- c) the mining policies are costing the industry dearly, with investment now going elsewhere in Africa, such as Zambia, Mozambique and Angola, among others; and
- d) agricultural development policy, coupled with land reform, not having been settled since 1994 is leading to reduced output.²⁶⁷

He further stated that this needed to change, as a general lack of policy stability leads to political, social and economic uncertainty.²⁶⁸ In contrast, policy stability creates an

²⁶² Luiz J M & Charalambous H "Factors influencing foreign direct investment of South African financial services firms in Sub-Saharan Africa" 2009 *International Business Review* 313.

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ Eye Witness News: Koza N "SA on list of global risk to political stability, should we be worried?" <http://m.ewn.co.za/2017/01/04/sa-on-list-of-global-risks-to-political-stability-should-we-be-worried> (Date of use: 17 March 2017).

²⁶⁶ Mail and Guardian Wakefield A "Phosa: South Africa's instability scares away investors" <http://mg.co.za/article/2015-05-20-south-africas-instability-scares-away-investors-anc-stalwart> (Date of use: 15 February 2017).

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

“investment friendly jurisdiction where every investor feels protected and free to do business”.²⁶⁹ In his argument, he stated that “past empowerment activities focused on dividing the economic cake rather than implementing actions and activities to grow the economic cake.”²⁷⁰

An example of political unpredictability is the reshuffling of the cabinet by the President of South Africa on the 31st of March 2017, when twenty persons were affected by this adjustment.²⁷¹ One of the cabinet members who was replaced, is the former Finance Minister, Pravin Gordhan, who²⁷² was appointed in December 2015.²⁷³ He replaced Des van Rooyen who was appointed for a few days only.²⁷⁴ Gordon held office for just over a year. South Africa has made it to the top ten on the list of global risks to political stability for 2017.²⁷⁵ However, Spies²⁷⁶ does not agree with the list. She argues that there are not sufficient facts contained in the list, and that, when one regards it in a global context, it is unlikely that South Africa should be so high on the list.²⁷⁷

The President, in his speech at the ANC rally in KZN²⁷⁸ blamed white persons for the country’s political instability and he alleged to be a victim in an international conspiracy to destabilise the country.²⁷⁹ In this regard, he stated that all the country’s money is still in white hands, and that those who were fighting against his reforms were, in fact, on the payrolls of these masters.²⁸⁰ He went on to state that he had to reappoint Mr

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ Khoza L M Eye Witness News “Zuma: Cabinet reshuffle to improve efficiency and effectiveness” <http://ewn.co.za/2017/03/31/zuma-says-reshuffled-cabinet-to-improve-efficiency-and-effectiveness> (Date of use: 31 march 2017).

²⁷² *Ibid.*

²⁷³ Donnelly L Mail & Guardian “Zuma appoints Pravin Gordhan as finance minister” <https://mg.co.za/article/2015-12-13-zuma-appoints-pravin-gordhan-as-finance-minister> (Date of use: 31 March 2017).

²⁷⁴ *Ibid.*

²⁷⁵ Eye Witness News: N Koza “SA on list of global risks to political stability, should we be worried?” <http://ewn.co.za/2017/01/04/sa-on-list-of-global-risks-to-political-stability-should-we-be-worried> (Date of use: 15 February 2017).

²⁷⁶ Spies Y is a professor and an international analyst at the University of Johannesburg.

²⁷⁷ Eye Witness News: N Koza “SA on list of global risks to political stability, should we be worried?” <http://ewn.co.za/2017/01/04/sa-on-list-of-global-risks-to-political-stability-should-we-be-worried> (Date of use: 15 February 2017).

²⁷⁸ The president addressed the supporters of ANC in Kwazulu Natal on 19 November 2016.

²⁷⁹ Business Tech S Writer “This is who Zuma is blaming for the political instability in South Africa.” <https://businesstech.co.za/news/government/143895/this-is-who-zuma-is-blaming-for-the-political-instability-in-south-africa/> (Date of use: February 2017).

²⁸⁰ *Ibid.*

Gordhan²⁸¹ because, “those with money would burn the country down”, if they did not have their way.²⁸²

These decisions and statements are worrisome to the investment community and they are an example of the lack of political stability in South Africa. Most of the ministers hardly serve their full term in offices, a fact that has always had a significant impact on the value of the. For example, after the cabinet reshuffle, the currency weakened by 8 per cent against the dollar.²⁸³ A few hours after the cabinet reshuffle, the value of the rand decreased from R12.79/\$ on 30 March 2017 to R13.47/\$ against the dollar by Friday morning at 6:30am.²⁸⁴ This was its biggest weekly drop since 2015 when the then Finance Minister Van Rooyen was dismissed.²⁸⁵

3.3 CONSTITUTIONAL RIGHT TO PROPERTY

The right to property is one of the important factors that influence the FDI inflow. The right to property is provided for in section 25 of the Constitution. Section 25(1) of the Constitution provides that “no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”. This provision protects the right to control assets. However, the acquisition of property is not provided for directly by section 25 the Constitution. Was it an error of the constitutional drafters not to provide for it directly, or was this done intentionally? The formulation of the right to property does not expressly refer to the acquisition of property.²⁸⁶ In the pre-1994 era, the acquisition of property was severely restricted for the majority of South Africans.²⁸⁷ It is difficult to assume that the constitutional drafters did not intend to include the constitutional right to property acquisition and protection. Therefore, one may conclude that the right to constitutional acquisition of property is implied by the Constitution since it is not provided for expressly.

²⁸¹ P Gordhan is the former Minister of Finance of South Africa

<http://www.treasury.gov.za/ministry/minister.aspx> (Date of use: 17 March 2017).

²⁸² Business Tech S Writer “This is who Zuma is blaming for the political instability in South Africa.” <https://businesstech.co.za/news/government/143895/this-is-who-zuma-is-blaming-for-the-political-instability-in-south-africa/> (Date of use: February 2017).

²⁸³ ENCA News “Update: Rand takes biggest weekly dive since 2015” <https://www.enca.com/money/rand-drops-in-face-of-cabinet-reshuffle> (Date of use: 31 March 2017).

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ Rautenbach I M *Constitutional Law* (6th ed 2012) 398.

²⁸⁷ *Ibid.*

The right to property includes the right to ownership, to use, to the exclusion of others from using it, to derive income from it, and to transfer and dispose of the property.²⁸⁸ The right to repatriation of the property is provided for in section 11 of the Protection of Investment Act, which provides that a foreign investor may, in respect of the investment, repatriate funds subject to taxation and other applicable legislation. The repatriation in this context includes the owner's property and is one of the main provisions in BITs. However, in the Investment Bill, the repatriation of property was not included, which was a great cause for concern on the part of foreign investors. The right to be able to move property at will is important.

The government realised this error and included the right to repatriation of property in the subsequent Protection of Investment Act. The right to property is provided for in section 10 of the Protection of Investment Act, in terms of which it provides that investors have a constitutional right to property. Section 10 allows foreign investors to own property within the Republic.

It is important to determine whether the person or institution whose right to property has allegedly been infringed, is indeed protected by the Constitution. Woolman and Bishop argue that there are theoretically six approaches in the constitutional property clause to be taken in order to determine how the competing interests between the public and the individual's property can be resolved.²⁸⁹ Firstly, the definition of property in terms of the Constitution will assist in determining the interest to be protected.²⁹⁰ If the interest in question is not of a type that can be protected by the Constitution, then it will not receive protection.²⁹¹ In this instance, the interest protected will be the public interest.

Second, the public interest as opposed to the individual right to property can be resolved by the court's approach to the concept of deprivation.²⁹² In order to deal with this enquiry, Woolman and Bishop differentiate between a strict approach and a

²⁸⁸ *Ibid.*

²⁸⁹ Woolman S and Bishop M *Constitutional Conversations* (2008) 266.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Ibid.*

generous approach.²⁹³ A strict approach would exclude an ambit of constitutional concern types of regulations and thereby resolve the issue in favour of the public interest.²⁹⁴ A generous approach tends to include a broader range of types of regulation and thereby resolves the issue in favour of the individual interest.²⁹⁵

Third, these competing interests can be resolved by using the application of the test of arbitrary deprivation in section 25 (1) of the Constitution.²⁹⁶ Fourth, the distinction between sections 25(1) (the deprivation clause), and 25(2) (the expropriation clause) of the Constitution plays an important role in this enquiry. The deprivation of property must occur in terms of the law of general application and arbitrary deprivation of property if not permitted.²⁹⁷ The expropriation of property is permitted only if it is for a public purpose and if just and equitable compensation is paid.²⁹⁸ Therefore, if these requirements are not met, the issue will be resolved in favour of private interest.

Fifth, the competing interest may be resolved once the court has decided that deprivation or expropriation has taken place and then enquire as to the amount, the time and the manner of compensation.²⁹⁹ If, for example, the amount is not just and fair, or the compensation was made after an unreasonable time has passed, the issue will be resolved in favour of the private interest. Lastly, the limitation clause applies to all rights in the Bill of Rights; therefore, the competing interest can be resolved by applying the requirements of section 36 of the Constitution.³⁰⁰

It is important to take this enquiry a step further and not only look at whether there is indeed a right to property that can be protected. As stated above, the competing interests of the host state and the foreign investor must be balanced in order create a mutually conducive foreign investment environment that will benefit both parties to a larger extent.

²⁹³ *Id* at 267.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ *Id* at 268.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

In South Africa, property rights are generally well protected and secured. According to the 2017 Index of Economic Freedom, South Africa scored 67,6 per cent in property rights protection.³⁰¹

3.4 POTENTIAL ECONOMIC GROWTH

This factor refers to the financial health and strength of the country and includes economic conditions of the host state, such as inflation, interest rates, growth in GDP, wealth distribution as well as macro-economic policies.³⁰² Based on the study by Luiz and Charalambous, this factor was rated 4,1 per cent as being less important and 4 per cent very important.

The increasing interdependence of the economic structure of modern society and the significant growth of the general price system and complex credit system have increased the responsiveness of economic markets to political conditions.³⁰³ In this regard, the market size and depth may influence the current as well as the potential future growth rates.³⁰⁴

Generally, developing countries that have been successful in attracting continued FDI are those with high economic growth rates and strong demographics. They are also benefitting from structural reforms, or are in the process of implementing those reforms. The state of a country's economy is measured by the size of its annual GDP, which is the final value of all its goods and services produced during a year.³⁰⁵ In South Africa it is determined by Statistics South Africa.³⁰⁶ There are different measures that are used to calculate the GDP. Each measure describes economic performance from a slightly different angle.³⁰⁷ To calculate the performance of the country, it is important

³⁰¹ 2017 Index of Economic Freedom "World Rank: South Africa"
<http://www.heritage.org/index/country/southafrica> (Date of use: 11 April 2017).

³⁰² Luiz J M & Charalambous H "Factors influencing foreign direct investment of South African financial services firms in Sub-Saharan Africa" 2009 *International Business Review* 313.

³⁰³ Cross F B "Law and Economic Growth" 2002 *Texas Law Review* 1738.

³⁰⁴ Luiz J M & Charalambous H "Factors influencing foreign direct investment of South African financial services firms in Sub-Saharan Africa" 2009 *International Business Review* 315.

³⁰⁵ Statistics South Africa "The ups and downs of gross domestic product"
<http://www.statssa.gov.za/?p=9181> (Date of use: 11 February 2017).

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

to observe the complete picture with all measures taken into account rather than looking at one aspect only.³⁰⁸

In South Africa, the consumer-orientated investment landscape is rather saturated and with economic growth being weak and in decline, it has not been an attractive destination for FDI. The local consumer also faces an uphill battle against high unemployment, rising inflation and elevated debt levels. Political uncertainty and the perception of corruption have further clouded investor sentiments towards South Africa.

The overall growth of the South African economy was 0,7 per cent in the third quarter of 2016. This is a 0,4 per cent increase in the first nine months of 2016 compared to the first nine months of 2015.³⁰⁹ The South African economy grew by an overall percentage of 0,2 in the third quarter quarter-on-quarter (compared to 3,5% in the second quarter) of 2016. The mining sector was the main positive contributor to growth in the third quarter in 2016.³¹⁰ After shrinking by 17,5 per cent in the first quarter, the mining industry recovered strongly in the second quarter, growing by 16,1 per cent.³¹¹ The growth rate of 5,1 per cent in the third quarter was mainly the result of increased production in mining of metal ores, particularly iron.³¹²

The activities related to the local government elections in August 2016 also contributed positively to economic growth.³¹³ For example, the payment of additional salaries to temporary electoral staff and the increased spending on goods and services increased the general government services by 1,8 per cent.³¹⁴ The finance industry also recorded a positive growth (1,2 per cent), as did personal services (0,6 per cent), construction (0,3 per cent) and transport (0,3 per cent).³¹⁵

³⁰⁸ *Ibid.*

³⁰⁹ Statistics South Africa "How the economy did in the third quarter of 2016?" <http://www.statssa.gov.za/?p=9208> (Date of use: 11 February 2017).

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² *Ibid.*

³¹³ *Ibid.*

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

Statistics South Africa recorded four industries that decreased in the third quarter of 2016. Firstly, the agriculture sector declined by 0,3 per cent for the seventh consecutive period per quarter. This was due to the worst drought that South Africa had experienced in recent years. Secondly, the trade industry recorded its first contraction since the second quarter of 2015, declining by 2,1 per cent.³¹⁶ This was largely as a result of a lacklustre performance in the wholesale, retail and motor trade, as well in catering and accommodation sectors.³¹⁷

Third, the electricity, gas and water industry declined by 2,9 per cent in 2016.³¹⁸ This was the result of the implementation of water restrictions across the country, together with waning electricity consumption.³¹⁹ Lastly, the manufacturing industry declined by 3,2 per cent in the third quarter of 2016 as a result of the decline in the production of petroleum and chemicals, as well as basic iron, steel, food and beverages.³²⁰ The heavy debts of the country may also have negatively affected the country's GDP.

The controversy surrounding President Jacob Zuma and the ANC is set to worsen in 2017, putting the country's economy at greater risk and damaging regional stability. According to the 2017 Index of Economic Freedom, South Africa currently has a world economic ranking of 81.³²¹

3.5 THE RULE OF LAW

The rule of law is an important feature of the Constitution and is a fundamental principle of a constitutional democracy. This principle is often equated with the German term, *Rechtsstaat* and they are generally used interchangeably.³²² The rule of law is the founding value of the Constitution³²³ and it could be interpreted to mean that the governors and the governed should be bound by the same set of rules.³²⁴ Therefore,

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ 2017 Index of Economic Freedom "World Rank: South Africa"

<http://www.heritage.org/index/country/southafrica> (Date of use: 11 April 2017).

³²² De Vos P and Freedman W *South African Constitutional law in Context* (2015) 78.

³²³ Section 1(c) of the Constitution.

³²⁴ Woolman S and Bishop M *Constitutional Conversations* (2008) 7.

any act that does not comply with the law must be declared invalid in so far as it does not comply.³²⁵

However, there is no agreement on the scope and the content of the rule of law, although scholars agree that it is an enforceable principle of law.³²⁶ The rule of law has been invoked in many cases by the South African courts to challenge an act of parliament or the executive. For example, in the case of *Fedsure Life Insurance LTD and Others v Greater Johannesburg Transitional Metropolitan Council and Others*,³²⁷ the powers of the Johannesburg local government to levy substantially higher property rates were challenged.

In this case, the court held that:

“...the rule of law to the extent at least that it expresses this principle of legally is generally understood to be a fundamental principle of constitutional law. It seems central to the concept of our constitutional order that the legislative and the executive in every sphere are constrained by the principle that may exercise no power and perform no function beyond that conferred upon them by law”.³²⁸

It is clear from the quote that the government may not perform its function beyond that which is granted to it by the Constitution as the supreme law of South Africa. This is a noble feature of the South African Constitution as it prevents the government from acting in its own interests to the detriment of others. From the foreign investor's perspective, it means that they may challenge directly any conduct by the government should it have acted beyond its conferred powers.

According to the 2017 Index of Economic Freedom, South Africa scored 59,7 for judicial effectiveness.³²⁹ The judicial system has been weakened as a result of political interference and frequent political infighting that undermined the government's integrity.³³⁰

³²⁵ *Ibid.*

³²⁶ De Vos P and Freedman W *South African Constitutional Law in Context* (2015) 78.

³²⁷ *Fedsure Life Insurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* CCT7/98 ZACC 17 BCLR (hereinafter referred to as the *Fedsure Life Insurance Ltd*).

³²⁸ Para 56 of the *Fedsure Life Insurance Ltd*.

³²⁹ 2017 Index of Economic Freedom “World Rank: South Africa”
<http://www.heritage.org/index/country/southafrica> (Date of use: 11 April 2017).

³³⁰ *Ibid.*

3.6 OPENNESS AND TRANSPARENCY

The concept of transparency is closely linked to the protection and promotion of foreign investment. In this context, transparency denotes a situation in which the players in the investment process are able to obtain sufficient information from each other in order to make informed decisions, and to meet obligations and commitments. This ensures that the special needs of both parties are met. Transparency also promotes accountability between the participants in foreign investments.

There is no agreed precise definition of transparency, and it is a generally used and undefined term.³³¹ It depends mainly on the context in which it is used and who is using it.³³² In the context of FDI, transparency may refer either to access to public information with respect to investor-state proceedings and/or increase in public participation in the proceedings themselves.³³³

In terms of the UNCTAD, transparency entails...

“The concept of transparency is closely associated with promotion and protection in the field of international investment. In the present context, transparency denotes a state of affairs in which the participants in the investment process are able to obtain sufficient information from each other in order to make informed decisions and meet obligations and commitments. As such, it may denote both an obligation and a requirement on the part of all participants in the investment process.”³³⁴

The concept of transparency may strengthen or weaken the relationship between the foreign investors and the host state. In foreign investment, transparency is required from the host state in such areas as regional, bilateral and multilateral treaties as well as national legislation. Both the host state and the foreign investor are required to be transparent during the pre-inception stages and post-inception stages. Therefore, transparency is already required during the pre-inception stages and must continue up to the ultimate inception of the investment in the host country. It is therefore essential that the judicial system of the host country be transparent and partial, at all times.

³³¹ Calamita N J “Dispute settlement transparency” 2014 *The Journal of World Investment and Trade* 649.

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ UNCTAD: United Nations, New York and Geneva “Transparency” http://unctad.org/en/Docs/iteiit20034_en.pdf (Date of use: 10 April 2017).

A study by the OECD and IMF shows that there is a strong positive nexus between FDI inflow and the quality of government.³³⁵ A number of countries have adopted access to information laws to demonstrate efficiency in government for the purpose of attracting investment that is critical to economic development.³³⁶ The transparency of the government when executing its duties plays a very important role in economic development on the national and international level. The principle of transparency may be included in national law, regional and international agreements.

This enables the foreign investor to make an informed decision about investing in a particular country. Both participants must be prepared to subject their activities to public scrutiny as and when the need arises. However, in the context of FDI, transparency is usually viewed from the foreign investor's perspective.³³⁷ Emphasis is placed on the obligation of the host state to provide full access to information required by the foreign investor.³³⁸ However, the host state is not precluded from accessing information about the foreign investors for the purpose of policy making and regulatory purposes.³³⁹ The precise degree of the transparency of information to be disclosed will be determined by the circumstances of the case.³⁴⁰

Non-transparent laws continue to hinder private investment, and it faces additional restrictions that impede efficiency.³⁴¹ This is because a lack of transparency also shields government officials from accountability.³⁴² Developing new or changing existing regulations without public consultation result in transparency problems³⁴³

There are exceptions to the disclosure of information, namely,

1. if it is for the purpose of national security and defence;

³³⁵ Organisation for Economic Co-operation and Development "*Foreign Direct Investment -Maximising Benefits, Minimising Costs*" <https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf> (Date of use: 10 April 2017).

³³⁶ *Ibid.*

³³⁷ Calamita N J "Dispute settlement transparency" 2014 *The Journal of World Investment and Trade* 283.

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ Nix R "Transparency obligations in international investment agreements: A paper presented at the seminar" https://archive.treasury.gov.au/documents/876/HTML/docshell.asp?URL=International_investment_agreements.htm (Date of use: 10 April 2017).

³⁴² *Ibid.*

³⁴³ *Ibid.*

2. if is for the purpose of law enforcement and legal processes and is the subject matter of judicial process or under investigation;
3. internal policy deliberations and premature disclosure of issues will hinder such deliberations;
4. the protection of commercially confidential information or information that may affect the right of individuals to privacy.³⁴⁴

The functions of the government are the following:

- (a) to consider, pass, amend or reject legislation on any subject that falls within its jurisdiction;
- (b) to ensure that all executive organs of state in the national sphere of government are accountable to it;
- (c) to maintain oversight of the exercise of national executive authority, including the implementation of legislation; and
- (d) to maintain oversight of any organ of state.³⁴⁵

In attempting to enforce transparency, the Constitution grants parliament powers to intervene, by passing legislation when it is necessary to maintain national security, economic unity and essential national standards.³⁴⁶ It is clear that the obligation imposed by the concept of transparency cannot be escaped without good cause. It confronts areas where secrecy in investment law has been a long-standing and firmly defended hallmark and pushes investment law towards an increasingly public regime.³⁴⁷

According to the 2017 Index of Economic Freedom, South Africa scored 47,6 per cent for government integrity. This is below average, and may be worrisome to foreign investors, because the integrity of a host state is directly linked to its transparency on a host of different factors.

³⁴⁴ *Ibid.*

³⁴⁵ Section 55 of the Constitution.

³⁴⁶ Section 44(2) of the Constitution.

³⁴⁷ Nijhoff B "Editorial: Five Times Transparency in International Investment Law" 2014 *The Journal of World Investment and Trade* 363.

3.7 THE SIZE OF THE POPULATION

A general theme under discussion is that countries with large populations provide many opportunities, ranging from growing purchasing power to a demand for pharmaceuticals and healthcare, to education. FDI is often targeted to selling goods directly to the country involved in attracting the investment.³⁴⁸ Therefore, the size of the population and scope for economic growth will be important for attracting investment in such circumstances.³⁴⁹ Countries with large populations offer scope for new markets that attract FDI.³⁵⁰

For example, car firms invest and build factories in a country in order to meet the demands of a growing consumer class.³⁵¹ Small countries may be at a disadvantage because it is not worth investing on such a scale for a small population.³⁵² Based on the study by Luiz and Charalambous, this factor was rated 1 as being less important³⁵³ Based on the United Nations estimates, the current population of South Africa is 55,279,705 as of Monday, 27 February 2017 based on the latest United Nations estimates.³⁵⁴ This means a large population, which may positively influence FDI inflow.

3.8 EXCHANGE RATE CONSIDERATIONS

These factors can affect a country adversely if it is going through a currency crisis, or experiencing intense volatility.³⁵⁵ The exchange rate may affect expected rates of return of FDI. Exchange rates can influence both the total amount of foreign direct investment that takes place and the allocation of this investment spending across a range of countries.³⁵⁶ A currency depreciates when its value declines relative to the value of another currency.³⁵⁷ The implications of the exchange rate for FDI is that it

³⁴⁸ T Pettinger "Factors that affect foreign direct investment"
<http://www.economicshelp.org/blog/15736/economics/factors-that-affect-foreign-direct-investment-fdi/>
(Date of use: 27 February 2017).

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.*

³⁵² *Ibid.*

³⁵³ Luiz J M & Charalambous H "Factors influencing foreign direct investment of South African financial services firms in Sub-Saharan Africa" 2009 *International Business Review* 314.

³⁵⁴ Worldometer "South African Population size (live): <http://www.worldometers.info/world-population/south-africa-population/> (Date of use: 27 February 2017).

³⁵⁵ *Ibid.*

³⁵⁶ Goldberg L S "Exchange Rates and Foreign Direct Investment" *Written for the Princeton Encyclopedia of the World Economy* (Princeton University Press) 01.

³⁵⁷ *Ibid.*

reduces that country's wages and production costs relative to those of its foreign counterparts.³⁵⁸

Based on the study by Luiz and Charalambous, this factor was rated 3 as being important overall, with 1 being less important and 4 being important.³⁵⁹ This factor may affect the FDI inflow in the developing countries, although it is often difficult to predict if local policies are erratic and it needs to be well understood especially with regard to future local operations and strategies.³⁶⁰

3.9 OPENNESS TO REGIONAL AND INTERNATIONAL TRADE AND TRADE INCENTIVES

Openness to trade deals with the restrictions on trade that are placed on goods and service to be imported the country. It is generally expected that there will be more FDI inflow if a country is open to regional and international trade. This is because openness to free trade tends to promote free trade, which encourages more investment.³⁶¹

What determines South Africa's average tariff rate? Imports of some agricultural products face additional barriers and state-owned enterprises operating in several sectors of the economy may affect the tariff rates of the country. The financial system which has been evolving gradually and the resilient banking sector which remains relatively sound have also played a role in the determination of the tariffs of the country.³⁶² The market must not only provide for higher investment, but also for higher quality investment.

Big multinationals, such as Apple, Google and Microsoft have sought to invest in countries with lower or favourable corporation tax rates.³⁶³ For example, Ireland has been successful in attracting investment from Google and Microsoft. Trade is important to South Africa's economy and may influence FDI. The value of exports and imports

³⁵⁸ *Ibid.*

³⁵⁹ Worldometer "South African Population size (live): <http://www.worldometers.info/world-population/south-africa-population/> (Date of use: 27 February 2017).

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² 2017 Index of Economic Freedom "World Rank: South Africa" <http://www.heritage.org/index/country/southafrica> (Date of use: 11 April 2017).

³⁶³ T Pettinger "Factors that affect foreign direct investment" <http://www.economicshelp.org/blog/15736/economics/factors-that-affect-foreign-direct-investment-fdi/> (Date of use: 27 February 2017).

together equals 63 per cent of South Africa's GDP.³⁶⁴ Numerous state-owned enterprises distort the economy, and recent efforts to ban foreign ownership of land and facilitate expropriation may discourage foreign investment.³⁶⁵ According to the 2017 Index of Economic Freedom, South Africa's investment freedom decreased to 40 per cent.

The financial sector is one of the largest among the emerging markets and includes sophisticated banking and bond markets, and plays a very important role in influencing FDI inflow.³⁶⁶ The top personal income tax rate was 41 per cent in 2016; this rate has now been increased to 45 per cent for 2017.³⁶⁷ The top corporate tax rate was 28 per cent in 2016.³⁶⁸ Other taxes include a value-added tax and a capital gains tax.³⁶⁹ The overall tax burden equals 22,6 per cent of total domestic income in 2016.³⁷⁰ Based on the study by Luiz and Charalambous, this factor was rated 1 and as being less important.³⁷¹ South Africa currently has an overall tax burden of 70,2 per cent. The government spending has been 32,4 per cent of total GDP for the past three years.³⁷²

3.10 CONCLUSION

The factors of FDI inflow have been discussed above. To a certain degree, these factors play an important role in influencing FDI inflow. According to Luiz and Charalambous, the most important factors are a country's governance, political stability, political economic growth, and openness and transparency. These factors have more than 4 ratings out of 5. South Africa currently ranks 81 on the world economic ranking with an overall rank of 62,3 per cent.³⁷³

The next chapter deals with the protection of FDI accordance with international law. This chapter first looks at the reasonable protection of foreign investment at an

³⁶⁴ 2017 Index of Economic Freedom "World Rank: South Africa"
<http://www.heritage.org/index/country/southafrica> (Date of use: 11 April 2017).

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ Luiz J M & Charalambous H "Factors influencing foreign direct investment of South African financial services firms in Sub-Saharan Africa" 2009 *International Business Review* 314.

³⁷² 2017 Index of Economic Freedom "World Rank: South Africa"
<http://www.heritage.org/index/country/southafrica> (Date of use: 11 April 2017).

³⁷³ *Ibid.*

international level. Second, it looks at the contractual guarantees emanating from BITs. Third, it looks at different international minimum standards of treatment. Forth, the chapter looks at the protection of investment through dispute resolution. Firth, the chapter looks at how foreign investment is protected in China. Lastly, the chapter deals with other international institutions that indirectly play a role in the protection and promotion of foreign direct investment.

CHAPTER 4: THE PROTECTION OF FOREIGN DIRECT INVESTMENT IN ACCORDANCE WITH INTERNATIONAL INVESTMENT LAW

4.1 INTRODUCTION

Since FDI is one of the main sources of economic growth, it is important for a host state to ensure that foreign investors receive adequate protection for their investment. The level or extent and scope of FDI protection play an important role in investment inflow and economic growth of the country. However, in as much as foreign investors are entitled to have their investment protected, the protection is not absolute and can be limited in certain circumstances. Moreover, the protection must be fair to both the host state and the foreign investor. A question arises as to what constitutes fair protection, as there are certain benefits that may not be reasonable for both parties.

This chapter looks at the protection of foreign investment from the investor's point of view. It also looks at different international minimum standards of treatment³⁷⁴ provided for in international investment law. There is a nexus between these IMST, even though they are different and do not have to be applied at the same time. The IMST is defined as

“a norm of customary international law, which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property”.³⁷⁵

Generally, states have a discretion to have the IMST included in their international agreements or domestic legislations. There are also similarities between these IMST concerning foreign investment protection. The IMST is essentially similar to standards of justice and treatment accepted by the civilised nations and may even include a standard higher than the one that the state applies against its own nationals.³⁷⁶ The main aim of these IMSTs is to protect foreign investment in the host state. These standards may be found in domestic law as legislation, as well as in international law in the form of the BITs. There IMST is generally contained in the traditional BITs.

³⁷⁴ The International Minimum Standard of Treatment (herein after referred to as the IMST).

³⁷⁵ The OECD “The international minimum standard of treatment
<https://asadip.files.wordpress.com/2008/09/mst.pdf> (Date of use: 21 June 2017).

³⁷⁶ Ndlovu P L *Juridical constraints on monetary Sovereignty: Implications for international economic law* 2015 University of South Africa Dissertation (unpublished LLM Dissertation) 58.

Although the international IMST is popular in the international investment community, there is no expressly agreed specific formulation of IMST.³⁷⁷ As a result, it is not clear what the meaning and practical application of IMST as a general rule of foreign investment law sets out.³⁷⁸ It is also not clear which actions by host states can violate the IMST.³⁷⁹

To a certain degree foreign investors rely on obligations by the host state when deciding in which state to invest.³⁸⁰ It sometimes happens that existing conditions at the time of the conclusion of an agreement may have changed later on. Therefore, foreign investors need to be protected from changing laws of host states that may adversely affect foreign investors.

4.2 THE LEGAL RELATIONSHIP BETWEEN THE HOST STATE AND THE FOREIGN INVESTOR

The relationship between the host state and the foreign investor is unique and comes into being after the host state and the investor's home state have entered into a BIT.³⁸¹

The parties are required to reach an agreement with regard to the dynamic terms and conditions of their agreement.³⁸² The new generation of BITs now requires a relationship between host state and investors to be based on several key factors, such as transparency in authoritative decision-making, impartiality of domestic and international courts, effective remedies being made available for disputes, and an overall strong framework for international investment law.³⁸³

These factors are essential for the host state to maintain strong regulatory and administrative frameworks, in order not to risk losing the flow of foreign investments.³⁸⁴ For this reason, the demand for international investment laws that protect and govern such a relationship is increasing.³⁸⁵

³⁷⁷ Cole T *The Structure of Investment Arbitration* (2013) 69.

³⁷⁸ *Ibid.*

³⁷⁹ *Ibid.*

³⁸⁰ Salacuse J W *The Law of Investment Treaties* (2010) 271.

³⁸¹ Bashmill H "Foreign investment disputes settlement under the ICSID and the protection of FDI" 2016 *Journal of Banking and Commerce* 2.

³⁸² *Ibid.*

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

Protection by law might have its limitations under certain circumstances and the foreign investor must weigh the risks and the benefits before deciding whether to invest in a country. Nothing compels the foreign investor or the host country to enter into an agreement with each other.

4.3 THE REASONABLE PROTECTION OF FOREIGN INVESTMENT

Foreign investors must be afforded reasonable protection in accordance with the traditional rules and regulations of international investment law. However, the extent of this protection is not clearly defined within the international investment community, and it is often based on the terms, the scope and the content of the agreement between the parties. The conclusion of BITs brings about obligations for both the host state and the foreign investor. However, the extent of such obligation depends on the scope of the terms of such agreement.

The reasonableness of the protection of foreign investment in the host state depends on whether the foreign investor has been granted minimum international acceptable treatment by the host state and the test for determining such, should be objective. BITs are usually structured in such a way that they provide foreign investors with high levels of substantive and procedural protection.³⁸⁶

The protection of FDI is reasonable if firstly, foreign investors are protected by international agreements where their rights are not protected under existing domestic laws.³⁸⁷ Second, international agreements should encourage host states to adopt market-oriented domestic policies that treat foreign investors fairly.³⁸⁸ Lastly, they should support the development of international law standards consistent with these objectives.³⁸⁹

Foreign investment may also be protected through by contractual guarantees, the purpose of which are is to provide foreign investors with reasonable protection by

³⁸⁶ Berger A "China's new bilateral investment treaty programme" https://www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf (Date of use: 29 September 2016).

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

prohibiting host states from introducing changes in their legislative or administrative framework which might adversely affect investors' rights.³⁹⁰

The introduction of international minimum standards for the treatment of foreign investors as a customary rule of international law dates back to the nineteenth century when foreign interests expanded in domestic territories.³⁹¹ During this period, the international minimum standards of treatment focused on the rights of foreign investors to the exclusion of national investors.³⁹²

What constitutes 'treatment', and does it require a comparison of the entire third-party treaty or only the clause conferring treatment or merely part of the provision conferring protection of FDI? Does the word 'treatment' refer only to rights or also to remedies for the violation of such rights?

Investment treaties import their own language and thus the extent of the investor's protection varies.³⁹³ However, the core standards of foreign investors' protection are virtually universal.³⁹⁴ These IMST include the fair and equitable treatment, the most favoured nation standard, the national treatment, and the full protection and security standard.

In the *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil (US) v Republic of Estonia*,³⁹⁵ the claimant sought to recover losses related to its investment in an Estonian financial institution. The ICSID tribunal, after having considered whether certain actions of the Bank of Estonia amounted to a violation of its obligation to accord "fair and equitable treatment" and "non-discriminatory and non-arbitrary treatment" under the US-Estonia 1994 BIT, dismissed the claim. In its consideration, it described the standard as follows:

³⁹⁰ Treaties and investment contracts" 2001 *The Journal of World Investment* 241.

³⁹¹ Falsafi A "The international minimum standard of treatment of foreign investors' property: a contingent standard" 2007 *Suffolk Transitional Law Review* 321.

³⁹² *Ibid.*

³⁹³ Segger M C *et al* (eds) *The Global Trade Law Series: Sustainable Development in World Trade Investment Law* (2011) 266.

³⁹⁴ *Ibid.*

³⁹⁵ The *A.S. Baltoil (US) v Republic of Estonia*, ICSID Case No: ARB/99/2

“..Under international law, this requirement is generally understood to ‘provide a basic and general standard which is detached from the host State’s domestic law’. While the exact content of the standard is not clear, the Tribunal understands it to require an ‘international minimum standard’ that is separate from domestic law, but that is, indeed, a minimum standard”.³⁹⁶

It is important for a foreign investor to investigate whether the host state has a BIT agreement in place with the investor’s home state. Once the foreign investor has established that the home state has a BIT with the host state, the foreign investor must enquire about the scope and the extent of the protection in terms of that BIT. This will be used as a point of departure when negotiating or renegotiating the contractual guarantees with the host state. There are further factors that the foreign investor must take into account when negotiating agreements with a host state, namely, the duration of the BIT, the political and economic risk in the host state, the size of the population of the host state, and previous precedents of national and international insurance schemes and the availability of the protection.³⁹⁷

The IMST are qualified by international law. Therefore, in a case of a dispute, specific rules of international investment law are used to determine the responsibility of states for injury to foreign investors.³⁹⁸ Each specific rule determines the scope of the IMST that international law affords foreign investors.³⁹⁹

Vandeveldel suggests that BIT provisions generally rest on six standards, namely, access, security, non-discrimination, reasonableness, transparency and due process.⁴⁰⁰ Principle of security refers to the protection of property rights and contract.⁴⁰¹ Non-discrimination refers to equal justice under law. The principle of reasonableness refers to the prohibition of arbitrary conduct by the government and not necessary by a person.⁴⁰² The principle of transparency requires that laws and

³⁹⁶ *Id* at para 367.

³⁹⁷ Bernardini P “The investment protection under Bilateral Investment Treaties and investment contracts” 2001 *The Journal of World Investment* 241.

³⁹⁸ Falsafi A “The international minimum standard of treatment of foreign investors’ property: a contingent standard” 2006-2007 *Suffolk Transnational Law Review* 317.

³⁹⁹ *Ibid*.

⁴⁰⁰ Vandeveldel K J “Model Bilateral Investment Treaty: the way forward” 2015 *Southwestern Journal of International Law* 313.

⁴⁰¹ *Ibid*.

⁴⁰² *Ibid*.

policies be made public.⁴⁰³ Lastly, the principle of due process requires a notice and an opportunity to be heard.⁴⁰⁴ The same principles apply to the protection of investment because these standards are the main tools for the protection for foreign investment.

The IMST originally dealt with both the personal security of foreign investors and the protection of their investments⁴⁰⁵. However, the international investment community held this to be advantageous to foreign investors only and it was abolished.⁴⁰⁶ At present, the protection applies to foreign investments only and is not extended to the investor.⁴⁰⁷

The principle of equality requires that foreign investors are treated equally within the realm of international law. Equal treatment consists of absolute standards and relative standards of treatment.⁴⁰⁸ Absolute standards of treatment are 'non-contingent' and are granted without regard to the way in which others are treated.⁴⁰⁹ These include provisions for 'fair and equitable treatment' and 'full protection and security'.⁴¹⁰ On the other hand, relative standards are treatment that is contingent and granted with reference to the treatment given to others. These include provisions for 'most favoured nation' and 'national treatment'.⁴¹¹

The concepts of fair and equitable treatment, national treatment, non-discrimination and most favoured nation are all expressions of the guarantees for investors and could increase the flow of foreign investment in the host state.⁴¹²

Two fundamental conventions aimed at protecting foreign investments adopted under the auspices of the World Bank, are the International Centre for the Settlement of

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Falsafi A "The international minimum standard of treatment of foreign investors' property: a contingent standard" 2006-2007 *Suffolk Transnational Law Review* 317.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.*

⁴⁰⁸ Chow M W "Discriminatory equality v non-discriminatory inequality: The legitimacy of South Africa's affirmative action policies under international law" (2008-2009 *The Connecticut Journal of International Law*) 306.

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid.*

⁴¹¹ These concepts will be defined and analyzed in detail below.

⁴¹² Segger M C *et al* (eds) *The Global Trade Law Series: Sustainable Development in World Trade Investment Law* (2011) 238.

Investment Dispute Convention⁴¹³ and the Multilateral Investment Guarantee Agency Convention.⁴¹⁴ The ICSID Convention deals with the settlement of investment disputes between a host state and a foreign investor.⁴¹⁵ The MIGA Convention establishes a scheme for insuring foreign investments against political, currency and other risks.⁴¹⁶ SADC also provides for the protection of foreign investment through the SADC Model Bilateral Investment Treaty Template with Commentary.⁴¹⁷ The SADC BIT Template provides a clear example of a shifting approach to investment governance in Southern Africa. The SADC Model BIT was developed in accordance with the overall goal of the SADC Protocol on Finance and Investment to promote the harmonisation of SADC member states' investment policies and laws.⁴¹⁸

4.4 CONTRACTUAL GUARANTEES AIMED AT PROTECTING FOREIGN DIRECT INVESTMENT

4.4.1 The stabilisation clause

A stabilisation clause is a provision in an agreement between a state and an individual investor whereby the state agrees not to use its sovereign and/or legislative powers to change the provisions of the agreement.⁴¹⁹ In this instance, the state undertakes to exempt the foreign investor from any changes that it may introduce in its legislation, or from administrative measures of a general application, whenever their effect would be to significantly reduce the economic return expected from the investment.⁴²⁰

The purpose of this clause is to freeze the law that was applicable at the time of the conclusion of an agreement. This occurs when state A enters into an agreement with company B and includes a provision stipulating that the law applicable at the time of

⁴¹³ The International Centre for the Settlement of Investment Dispute Convention, Regulations and Rules, 2006 (hereinafter referred to as the ICSID Convention).

https://www.google.co.za/?gws_rd=ssl#q=icsid+convention (Date of use: 14 July 2016).

⁴¹⁴ The Multilateral Investment Guarantee Agency Convention of 1988 (hereinafter referred to as the MIGA Convention) <https://www.miga.org/who-we-are/miga-convention/> (Date of use: 15 July 2016).

⁴¹⁵ Bernardini P "The investment protection under Bilateral Investment Treaties and investment contracts" 2001 *The Journal of World Investment* 239.

⁴¹⁶ *Ibid.*

⁴¹⁷ The SADC Model Bilateral Investment Treaty Template with Commentary 2012 (hereinafter referred to as the SADC Model BIT).

⁴¹⁸ Woolfrey S "The SADC Model Bilateral Investment Treaty Template: Towards a new standard of investor protection in southern Africa" 2014 *Tralac Trade Law Centre* 3 <https://www.tralac.org/images/docs/6771/d14tb032014-woolfrey-sadc-model-bit-20141210-fin.pdf> (Date of use: 26 August 2016).

⁴¹⁹ Booysen H *Principles of International Trade Law as a Monistic System* (2007) 501.

⁴²⁰ Bernardini P "The investment protection under Bilateral Investment Treaties and investment contracts" 2001 *The Journal of World Investment* 241.

concluding the agreement will remain, even if the law of the state should change at a future date. Naturally, this would limit the powers of the state, because even if its law changes, these changes will not have an effect on the agreement that has already been concluded.

The reverse aspect of the stabilisation clause would, of course also benefit investors, as the law had already been frozen since the conclusion of the contract. As with any other contractual agreement, the parties have the right to choose the terms in the stabilisation clause.⁴²¹

Any amendments in the legislative and administrative framework of the host state may affect the economic return on an investment as originally forecast, and/or the foreign investor's ability to continue to operate in the country in terms of the agreed conditions.⁴²²

Generally, a stabilisation clause should contain three sub-sections.⁴²³ Firstly, the clause should state that the rights conferred by the agreement would remain unaffected by subsequent legislation or administrative actions.⁴²⁴ Second, it could state that the agreement will prevail over any future legislation or administrative regulation, should there be any inconsistency between the agreement and such legislation or regulation.⁴²⁵ Finally, it must ensure that the agreement will be interpreted and applied in accordance with the domestic law that was applicable at the time of the conclusion of the agreement.⁴²⁶

4.4.2 The renegotiation clause

In certain circumstances, a state is prohibited from waiving or limiting sovereign prerogatives because of its obligation to govern in the public interest.⁴²⁷ For this reason, the stabilisation clause may not be the best option for the host state, and it

⁴²¹ *Id* at 502.

⁴²² *Id* at 241.

⁴²³ Booyesen H *Principles of International Trade Law as a Monistic System* (2007) 501.

⁴²⁴ *Id* at 502.

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid.*

⁴²⁷ Bernardini P "The investment protection under Bilateral Investment Treaties and investment contracts" 2001 *The Journal of World Investment* 242.

may be necessary to insert a renegotiation clause in the agreement. Thus, the renegotiation clause allows the host state and the foreign investor to insert a clause in their agreement, which provides for the renegotiation of the terms of the agreement in future.

Renegotiation of a contract can be defined as that which creates a dialogue between parties and a common pursuit for an agreement with the objective of harmonising respective behaviour in order to reach a mutual convergence of opposite interests to maintain a contractual relationship upon revised conditions.⁴²⁸ The renegotiation clause is applied when the terms and conditions of the agreement are fundamentally modified.⁴²⁹ The renegotiation clause is likely to provide effective protection, unless there is a prescribed objective such as restoring the economic equilibrium or default option if the negotiation fails, for example, payment of compensation by the state.⁴³⁰

The VC on the Law of Treaties states that agreements should be interpreted in good faith.⁴³¹ The principle of good faith applies to the negotiation, formation and renegotiation of an international agreement, and the rights and obligation of the parties.⁴³² The parties must exercise good faith at the first stage of the formation of an agreement.⁴³³ The principle of good faith imposes behavioural requirements on the contracting parties with the option of renegotiating of the contract should difficulties arise.⁴³⁴ Both parties are prohibited from causing prejudice and/or betraying, or from taking advantage, of the other party.⁴³⁵

Good faith therefore, is the foundational principle of foreign agreements and parties cannot contract without good faith.⁴³⁶ The parties are required to negotiate their

⁴²⁸ Lorfing A "The contractually unforeseen renegotiation" 2010 *Thomson Reuters (Legal) Limited and Contributors* 36.

⁴²⁹ *Ibid.*

⁴³⁰ Segger M C (eds) *The Global Trade Law Series: Sustainable Development in World Trade Investment Law* (2011) 338.

⁴³¹ Article 31 The VC on the Law of Treaties.

⁴³² Shai M T *The role of good faith international economic law* 2011 (A dissertation submitted for an LLM degree at the University of South Africa) 71.

⁴³³ *Id* at 60.

⁴³⁴ ⁴³⁴ Lorfing A "The contractually unforeseen renegotiation" 2010 *Thomson Reuters (Legal) Limited and Contributors* 36.

⁴³⁵ *Ibid.*

⁴³⁶ Shai M T *The role of good faith international economic law* 2011 (A dissertation submitted for an LLM degree at the University of South Africa) 17.

agreement in good faith. Lack of good faith from either party could lead to finding legal grounds for the renegotiation of the agreement.⁴³⁷

Renegotiation clauses offer protection against changes in economic circumstances. For example, an alteration of the agreed upon goods, their price, supply and sale may lead to the renegotiation of a contract.⁴³⁸ However, an unforeseeable change in circumstances *per se* does not give rise to a claim for renegotiation.⁴³⁹ Whether a foreign investor has a claim for renegotiation will have to be judged on the circumstances of each case.⁴⁴⁰

Therefore, it is important for the parties to clearly define events and elements, which may trigger the renegotiation of an agreement. The parties must also clearly define how renegotiation should occur.⁴⁴¹

4.4.3 The umbrella clause

Under customary international law, a violation of an agreement entered into with a foreign investor by a host state does not give rise *per se* to international responsibility on the part of the state.⁴⁴² In order to enforce stronger standards of protection in favour of foreign investors, the so-called 'umbrella clauses' have been inserted into BITs since the 1950s.⁴⁴³

The first Arbitral Tribunal to have applied an umbrella clause is believed to be the ICSID Tribunal in the *Fedax v Venezuela*⁴⁴⁴ based on the Netherlands and the Republic of Venezuela BIT. In this case, the tribunal was unaware that there was an umbrella clause, and did not carry out any in-depth examination of the clause or its application. It simply applied the 'plain meaning' of the provision, that commitments should be observed under the BIT, to the promissory note contractual document. It found that

⁴³⁷ Lorfing A "The contractually unforeseen renegotiation" 2010 *Thomson Reuters (Legal) Limited and Contributors* 36.

⁴³⁸ Russi L "Chronicles of a failure: from a renegotiation clause to arbitration of transnational contracts" 2008-2009 *Connecticut Journal of International Law* 81.

⁴³⁹ *Ibid.*

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Id* at 84.

⁴⁴² Selatino G "Overview of umbrella clause" 2012 *Journal of International Business Law* 51.

⁴⁴³ *Ibid.*

⁴⁴⁴ *Fedax NV v Republic of Venezuela*, Award 9 March 1998, 37 ILM 1391 (1998) para 25 and 29.

Venezuela was under the obligation to “honour precisely the terms and conditions governing such investment, laid down mainly in Article 3 of the Netherlands and the Republic of Venezuela BIT, as well as to honour the specific payments established in the promissory notes issued”.⁴⁴⁵

The scope of the umbrella clause was first evaluated in the *SGS Société Générale de Surveillance, S.A. v Pakistan*⁴⁴⁶ case. The Tribunal held that a breach of contract is not an automatic breach of a treaty. The Tribunal held that *Article 11* of the Netherlands and the Republic of Venezuela BIT does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a state are automatically elevated to the level of breaches of international treaty law.⁴⁴⁷

The inclusion of an umbrella clause into the BITs by contracting states creates an exception to the general rule of the autonomy of municipal legal systems, on the one hand, and international legal systems, on the other. For this reason, a mere violation of an agreement may be elevated to a violation of international law.⁴⁴⁸ This is because the obligation assumed by the agreement has been internationalised.⁴⁴⁹ For example, should a host state be in breach of an investment contract that is protected by the umbrella clause, the aggrieved foreign investor might sue for such a breach in terms of international investment law.

The umbrella clause seeks to bring under the protecting “umbrella” of the treaty obligations of the states that arise out of instruments other than the treaty itself.⁴⁵⁰ One such instrument is a contract, which is the legal tool utilised by FDI agreements.⁴⁵¹

The question arises as to whether the natures of a treaty obligation and that of a contractual obligation are the same or at least similar, so as to render them amenable to interchangeable application in the investment context. If the answer to this is in the

⁴⁴⁵ *Id* at 29.

⁴⁴⁶ *SGS Société Générale de Surveillance, S.A. v Pakistan*, ICSID case No ARB/01/13, 6 August 2003, 18 ICSID rev- F.I.L.J. 307.

⁴⁴⁷ *Id* at 166.

⁴⁴⁸ Selatino G “Overview of umbrella clause” 2012 *Journal of International Business Law* 53.

⁴⁴⁹ *Ibid*.

⁴⁵⁰ Fleury RPS “Treaty-protected investment agreements: of umbrella clauses and privity of contract” 2016 *Willamette Journal of International Law and Dispute Resolution* 320.

⁴⁵¹ *Ibid*.

affirmative, then it may be argued that a contractual obligation can indeed be elevated to a treaty obligation with a simple reference in an umbrella clause.⁴⁵²

Jaemin⁴⁵³ argues that if a contractual obligation and a treaty obligation are inherently distinguishable, forcing a contractual obligation into a treaty obligation may almost amount 'to putting a square peg into a round hole'.⁴⁵⁴ He points out that the violation of an agreement is justified when it is not necessarily provided for in the agreement itself, but by international investment law.⁴⁵⁵

However, regardless of the specific provisions of an agreement, a host state may still have recourse to a necessity defence regarding a measure taken in times of economic emergency.⁴⁵⁶ Should an aggrieved foreign investor decide to resolve the dispute via international dispute resolution mechanisms, such investor is precluded from seeking remedies in terms of domestic law, if the remedy will benefit of the host state.⁴⁵⁷

Gaillard⁴⁵⁸ is of the view that the natures of a treaty obligation and that of a contractual obligation are similar. He makes this argument by referring to the effects of an umbrella clause as the 'mirror effect clause' because if there is a violation of a contract, the umbrella clause, like a mirror, reflects it as a violation of BITs. In his argument, he states:

"I myself prefer to call it a 'mirror effect clause' because in fact it is a mirror effect which it creates. You have a violation of the contract, and the Treaty says, as if you had a mirror, that this violation will also be susceptible to being characterised as a violation of the Treaty. So the same facts, the same breach will be a violation of the contract in itself, and a violation of the Treaty".⁴⁵⁹

⁴⁵² Lee J "Putting a Square Peg into a Round Hole? Assessment of the 'Umbrella Clause' from the Perspective of Public International Law" 2015 *Chinese Journal of International Law* 345.

⁴⁵³ Jaemin L is Professor of Law at Hanyang University in Seoul, School of law, Korea https://www.wto.org/english/forums_e/public_forum12_e/bio_jaemin_lee_e.pdf (Date of use: 13 September 2015).

⁴⁵⁴ Lee J "Putting a Square Peg into a Round Hole? Assessment of the 'Umbrella Clause' from the Perspective of Public International Law" 2015 *Chinese Journal of International Law* 345.

⁴⁵⁵ *Id* at 362.

⁴⁵⁶ *Ibid*.

⁴⁵⁷ *Ibid*.

⁴⁵⁸ Gaillard E is a professor of law at the University of Paris XII and a Chairman of International Arbitration Institute <http://www.arbitration-icca.org/about/governing-board#/about/governing-board/Treasurer.html> (Date of use: 13 September 2016).

⁴⁵⁹ Eds Lim L C *Alternative Visions of the International Law on Foreign Investment essays in honour of Muthucumaraswamy Sornarajah* (2016) 358.

Investment protection is also provided through the Draft Articles on Responsibility of States for Internationally Wrongful Acts,⁴⁶⁰ which contain grounds that are regarded as wrongful in international law. They include both the actions and the omissions of states.⁴⁶¹ The acts of a host state can be construed as internationally wrongful when there is conduct consisting of an action or an omission that is attributable to the host state under international law, and when such conduct constitutes a breach of an international obligation of the host state.⁴⁶²

However, Article 12 of the Draft Articles on Responsibility of State requires that the obligation must be in force at the time of occurrence of the act. This means that if the conduct of the host state occurs before the parties have entered into an agreement that contains an umbrella clause or any other clause aimed at protecting foreign investment, the host state is not in breach an international obligation.

4.4.4 The governing law clause

As a general rule, law is not static and may be amended to suit circumstances of a particular government at a particular time. Furthermore, states have a sovereign right to regulate their territory in the public interest. The question arises as to whether such right is absolute. The answer is no. An international agreement usually imposes restrictive rights and obligations on the host state.⁴⁶³ For example, the host state is obliged to regulate in a way that does not discriminate on the basis of nationality.⁴⁶⁴ The host state also has an obligation to provide a minimum accepted standard of treating foreign investors, as required by international law, to compensate an aggrieved foreign investor in the event of an expropriation, and to allow transfers of funds from and to the investment.⁴⁶⁵

⁴⁶⁰ The Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 (hereinafter referred to as the Draft Articles on Responsibility of State) http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (Date of use: 14 September 2016).

⁴⁶¹ Article 2 of the Draft Articles on Responsibility of State.

⁴⁶² *Ibid.*

⁴⁶³ Chase P H "TTIP, investor–state dispute settlement and the rule of law" 2015 *European View* 222.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

However, under customary international law, states have a sovereign prerogative to allow entry of foreign investment in their territory.⁴⁶⁶ The host state also has a right to regulate the operation of foreign investment after an entry in its territory, notwithstanding the terms of the agreement signed.⁴⁶⁷ This is because the host state's foreign investment legal framework is essentially applicable within its boundaries only.⁴⁶⁸

For this reason, the foreign investor may be in a vulnerable position vis-à-vis the host state. The assumption is that parties have the autonomy to choose the law which will be applicable to their investment agreement.⁴⁶⁹ For this situation to be balanced out, the host state and the foreign investor may enter into an agreement, whereby both parties choose the law that will govern their investment agreement⁴⁷⁰ by inserting a clause which stipulates the applicable law, whether it be domestic or international law, or both. The choice-of-law clause is to ensure that the investment agreement is not subject to the laws of the host state without the consent of the foreign investor.⁴⁷¹

There are various ways of determining the governing law of an international agreement. For example, the parties may refer to international law by name or to its sources, or by implication⁴⁷² in the hope that that the protection of the foreign investor against the host state will be increased.⁴⁷³ If the parties choose international law as the applicable law, their legal relation is removed from the particular domestic legal system.⁴⁷⁴

4.4.5 The Internationalisation of an agreement

Owing to states' obligations states to serve the citizens within their territory, they may frustrate agreements with foreign investors, should such agreements be governed by domestic law.⁴⁷⁵ States may change their domestic laws, through legislative process

⁴⁶⁶ Sornarajah M *The International Law on Foreign Investment* (2004) 310.

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Id* at 311-312.

⁴⁶⁹ *Id* at 411.

⁴⁷⁰ *Id* at 410.

⁴⁷¹ *Ibid.*

⁴⁷² Booyesen H *Principles of International Trade Law as a Monistic System* (2007) 207-210.

⁴⁷³ *Id* at 496.

⁴⁷⁴ *Id* at 211.

⁴⁷⁵ *Id* at 500.

or by executive action.⁴⁷⁶ As a result, they may exonerate themselves from the obligations of the agreement with a foreign investor and thereby prejudice the foreign investor in the process.⁴⁷⁷

To avoid this, the host state and the foreign investor may enter into an agreement to remove their legal association from a particular domestic legal system⁴⁷⁸ by internationalising their agreement. Once they have been done, the agreement is neither governed by domestic, nor international law, but by its own legal system, by general principles recognised by civilised states, international treaty law which is distinguished from domestic or international law and international administrative contracts.⁴⁷⁹

However, the internationalisation of a legal relationship only takes place within the parameters set by domestic law.⁴⁸⁰ Furthermore, the parties are not allowed to circumvent international obligations arising from their agreement.⁴⁸¹

4.4.6 The expropriation clause

Generally, the expropriation of another party's property without consent is wrong and at times unlawful. However, the taking can be acceptable if carried out for public purpose, using due process and with compensation.⁴⁸² A BIT usually contains a guarantee against the expropriation of foreign investment without compensation.⁴⁸³ This guarantee removes any fear of expropriation that the foreign investor may have in the prospective host state.⁴⁸⁴ Lowe⁴⁸⁵ suggests that "when one thinks of unlawful interference with the interest of the foreign investor, it is natural to think first of expropriation".⁴⁸⁶

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Id* at 207-210.

⁴⁷⁹ *Id* at 496.

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Ibid.*

⁴⁸² Chase P H "TTIP, investor-state dispute settlement and the rule of law" 2015 *European View* 224.

⁴⁸³ Sornarajah M *The International Law on Foreign Investment* (2004) 110.

⁴⁸⁴ *Ibid.*

⁴⁸⁵ Vaughan L is a professor of public international law at the University of Oxford.

⁴⁸⁶ Vaughan L "the changing dimensions of international investment law" 2007 *Oxford University Press Faculty of Law Legal Studies Research Paper Series* 53.

Vaughan argues that although the taking of property into public ownership, like nationalisation and expropriation, is not inherently improper, the abusive or uncompensated interferences with property rights of foreign investors, and unpredictable interferences with those rights, are always disruptive, and that such a risk creates a poor environment for foreign investment.⁴⁸⁷ It was for this reason that that investment protection agreements came into being in order to encourage FDI.

Expropriation clauses are usually included in investment treaties and domestic legislation. Furthermore, the extent, scope and content of these clauses are dependent on the terms agreed upon by the parties. However, there is a large degree of consensus among states on the criteria of a lawful expropriation. They agree that the taking of the foreign investor's property must be:

- effected by due process of law;
- for a public purpose;
- non-discriminatory; and
- made against the payment of compensation as required by international law.⁴⁸⁸

If these requirements are not met, the taking may be unlawful and the foreign investor may submit a claim against the host state for compensation or even restitution in certain circumstance. For example, the taking of the foreign investor's property to retaliate against the foreign investor's home country is unlawful and does not meet the requirements for lawful expropriation.⁴⁸⁹

4.5 THE PROTECTION OF FOREIGN DIRECT INVESTMENT IN TERMS OF THE INTERNATIONAL MINIMUM STANDARDS OF TREATMENT

4.5.1 The most favoured nation standard of treatment

The concept of the IMST is a complex one. For example, what is a minimum standard of treatment that a host state owes the foreign investor? Who determines the content and scope of the IMST? Do states have an inherent obligation to provide foreign investors with IMST?

⁴⁸⁷ *Id* at 9.

⁴⁸⁸ *Id* at 53.

⁴⁸⁹ *BP Exploration Company (Libya) v Government of the Libyan Arab Republic* ILR 1973-1974 at 329.

Generally, the IMST provides foreign investors with a number of post-establishment rights.⁴⁹⁰ These are the rights accorded covered foreign investors once their investments have been admitted to the territory of one of the contracting states. Many BITs qualify these rights by allowing the contracting parties to provide privileges to certain foreign investors, should these have arisen from *inter alia* economic integration or taxation agreements.⁴⁹¹

If a foreign investor fails to secure a desired standard of protection from the BIT by way of negotiation, the party still has a chance of being a beneficiary of that protection by virtue of the MFN clause.⁴⁹² The MFN standard originated from the old Friendship Commerce and Navigation treaties.⁴⁹³ These FCN treaties included a provision giving companies from the signatory countries the right to hire the executive personnel of their choice, or employer choice provision in their operations abroad.⁴⁹⁴

The definition of the MFN standard is contained in Article 4 of the International Law Commission Draft Articles on Most Favoured Nation clause⁴⁹⁵ and states that; “a most-favoured-nation clause is a treaty provision whereby a state undertakes an obligation towards another state to accord most-favoured nation treatment in an agreed sphere of relations”.

This occurs where state A and State B sign a BIT that contains an MFN clause, and state A affords more favourable treatment to foreign investors of state C. In this instance, foreign investors of state B are entitled to a higher favourable treatment than the one offered to foreign investor of state C.⁴⁹⁶

⁴⁹⁰ Woolfrey S “The SADC Model Bilateral Investment Treaty Template: Towards a new standard of investor protection in southern Africa” 2014 *Trade Law Centre* 4-5
<https://www.tralac.org/images/docs/6771/d14tb032014-woolfrey-sadc-model-bit-20141210-fin.pdf>
 (Date of use: 26 August 2016).

⁴⁹¹ *Id* at 5.

⁴⁹² Salacuse J W *The Law of Investment Treaties* (2010) 252.

⁴⁹³ *Ibid*.

⁴⁹⁴ Silver G D “Friendship, commerce and navigation treaties and United States discrimination law: the right of branches of foreign companies to hire executives of their choice” 1989 *Fordham Law Review* 765.

⁴⁹⁵ The International Law Commission Draft Articles on Most Favoured Nation Clause (hereinafter referred to as the ILC Draft Articles on MFN clauses)
http://legal.un.org/ilc/texts/instruments/english/commentaries/1_3_1978.pdf (Date of use: 20 May 2016).

⁴⁹⁶ Cole T *The Structure of Investment Arbitration* (2013) 97.

The MFN standard requires non-discrimination between different foreign investors by the host state.⁴⁹⁷ The principle of non-discrimination is a central feature of BITs, which typically provide for most favoured-nation treatment and national treatment. The MFN is distinguished from the national treatment standard because the MFN standard ensures that foreign investors covered by the BIT are not discriminated against, relative to other foreign investors, while the national treatment standard ensures that they are not discriminated against, relative to domestic investors.⁴⁹⁸

Therefore, the host state is under an obligation to extend a favourable treatment to foreign investors from the moment it grants such treatment to an investor from a third country.⁴⁹⁹ This may impose heavy costs on the host state. However, the 'right to claim' approach limits the responsibility of the host state to extend favourable trading conditions to a foreign investor only when the claimant makes such a claim.⁵⁰⁰ The MFN clause may also be found in domestic laws. It is in the discretion of the state to include the MFN clause in their domestic laws, policies and regulations.

Like the national treatment standard, the MFN standard is relative because it defines the required treatment by reference to the treatment accorded to other investments in similar circumstances.⁵⁰¹ It enables foreign investors of the contracting parties to benefit from favourable treatment that may be afforded to nationals of a third state by either contracting state.⁵⁰²

⁴⁹⁷ Article 4 (Commentary) of the Southern African Developing Community Model Bilateral Investment Treaty Template, 2012

http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj1ksDPv_DNAhUEDMAKHe8dCokQFggaMAA&url=http%3A%2F%2Fwww.iisd.org%2Fitn%2Fwp-content%2Fuploads%2F2012%2F10%2Fsadc-model-bit-template-final.pdf&usq=AFQjCNEPC_oz9mq7V0qEB0KXL8yVXrq80g&sig2=VNwDutREbbQA5mqdUV3W8Q&bvm=bv.126993452,d.d2s (Date of use: 13 July 2016).

⁴⁹⁸ Woolfrey S "The SADC Model Bilateral Investment Treaty Template: Towards a new standard of investor protection in southern Africa" 2014 *Trade Law Centre* 4-5
<https://www.tralac.org/images/docs/6771/d14tb032014-woolfrey-sadc-model-bit-20141210-fin.pdf> (Date of use: 26 August 2016).

⁴⁹⁹ Thulasidhass P R "Most-Favoured-Nation Treatment in International Investment Law: Ascertaining the Limits through Interpretative Standards" 2015 *The Amsterdam Law* 8.

⁵⁰⁰ *Ibid.*

⁵⁰¹ Lawal O S "Variability of fair and equitable treatment standard according to the level of development, governance capacity and resources of host countries" 2014 *Journal of International Commercial Law and Technology* 229.

⁵⁰² *Ibid.*

In terms of foreign investment law, the application and scope of the clause is divided into two categories, namely, the substantive protection and the procedural protection, also known as dispute settlement.⁵⁰³ The substantive protection means that no foreign investor of any state is allowed to bring a claim directly against other foreign states.⁵⁰⁴ Procedural protection entails the protection of foreign investment in the form of remedial action.⁵⁰⁵ It is universally accepted that the MFN clause applies to substantive rights.⁵⁰⁶ However, it remains highly controversial as to whether the MFN clause should equally apply to procedural rights.⁵⁰⁷

The purpose of the MFN standard is to afford the foreign investor, who is one of the contracting parties to a BIT, a favourable trading condition in the host state.⁵⁰⁸ Another purpose of the MFN standard is to guarantee a favourable treatment to the nationals or companies of one contracting state in the territory of the other, if the host state grants a favourable treatment to the nationals or companies of a third country.⁵⁰⁹ Furthermore, the MFN standard can be used to grant equality in trading conditions and not to grant superiority, or to guarantee the combination of advantageous rules and standards in BITs.⁵¹⁰

The MFN standard affords foreign investors more favourable treatment than available under customary international law.⁵¹¹ In general, the MFN standard prohibits the host state who is a party to a BIT, from granting foreign investors of other contracting states more favourable trading conditions.⁵¹² This means that one party to the agreement is not allowed to grant better trading prices and rates to foreign investors of third parties than those granted to foreign investors of the contracting party.⁵¹³

⁵⁰³ Junngam N "An MFN clause and BIT dispute settlement: a host state's implied consent to arbitration by reference" 2010 *UCLA Journal of International Law and Foreign Affairs* 403.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ *Id* at 405.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ *Ibid.*

⁵⁰⁸ Thulasidhass P R "Most-Favoured-Nation treatment in international investment law: Ascertaining the limits through Interpretative Standards" 2015 *The Amsterdam Law* 4.

⁵⁰⁹ *Id* at 7.

⁵¹⁰ *Id* at 8.

⁵¹¹ Subedi S P *International Investment Law: Reconciling Policy and Standard* (2012) 57.

⁵¹² Zimmer D and Blaschczok M "The Most-Favoured-Customer clauses and two-sided platforms" 2014 *Journal of International Competition and Practice* 189.

⁵¹³ *Ibid.*

Furthermore, if the host state grants a foreign investor from a third state favourable treatment, an obligation arises for the host state to grant foreign investors of the contracting states, at least the equivalent treatment to that afforded to a third party.⁵¹⁴

4.5.2 The fair and equitable treatment standard

The origin of the FET standard can be traced back to early customary international law. However, there is no precise definition of this standard, as there is no consensus between writers, arbitrators, scholars and judges on what precisely constitutes a FET. Notwithstanding, this concept has not been precisely defined; it has been used in international arbitration to evaluate the appropriateness of a government's conduct that does not easily qualify as a form of expropriation.⁵¹⁵

The Havana Charter for the International Trade Organisation⁵¹⁶ was the first instrument to contain a reference to the 'equitable' treatment accorded to the investment of a foreign investor.⁵¹⁷ Article 11(2) of the Charter states that the International Trade Organisation⁵¹⁸ could make recommendations for and promote bilateral or multilateral agreements on measures designed to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one member country to another.⁵¹⁹ In Africa, the FET standard was referred to for the first time in the Report of the Forth Season Asian African Legal Consultative Committee.⁵²⁰

Although none of these agreements came into force, some of the US treaties on friendship, commerce and navigation began to incorporate the terms 'fair and equitable' treatment.⁵²¹

⁵¹⁴ Cole T *The Structure of Investment Arbitration* (2013) Routledge Taylor & Francis Group 81.

⁵¹⁵ Segger M C et al (eds) *The Global Trade Law Series: Sustainable Development in World Trade Investment Law* (2011) 238.

⁵¹⁶ *The 1948 Havana Charter for the International Trade Organisation* (hereinafter referred to as the *Havana Charter*) https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-1-b&chapter=10&lang=en (Date of use: 30 May 2016).

⁵¹⁷ Article 11 (2) of the Havana Charter for the International Trade Organisation.

⁵¹⁸ International Trade Organisation (hereinafter referred to as the ITO).

⁵¹⁹ The Havana Charter for the International Trade Organisation never came into force; however, its provision that dealt with the protection of foreign investment was later incorporated into investments agreement.

⁵²⁰ *The Fourth Season Asian African Legal Consultative Committee Year book of the International Law Commission*.

⁵²¹ Segger M C et al (eds) *The Global Trade Law Series: Sustainable Development in World Trade Investment Law* (2011) 238.

The FET standard brings in the elements of fairness and equity drawn from customary international law.⁵²² However, the precise meaning of the terms ‘fair and equitable’ is a controversial one.⁵²³ In terms of this standard, the host state is required to afford foreign investment of the contracting states to a BIT a fair and equitable treatment.

The FET standard is absolute in the sense that it requires the host state to accord foreign investors’ fair treatment in terms of their own defined content, though their exact meaning has to be determined by reference to specific circumstances of application.⁵²⁴ Furthermore, it has its own meaning, and is not necessarily satisfied by treating an investor in the same way the host state treats its own nationals, or other foreign investors of third parties.⁵²⁵ Therefore, the court decisions regarding the FET standard depend on the circumstances of each case.⁵²⁶

In the *Asian Agricultural Products Ltd v Republic of Sri Lanka*⁵²⁷ case, Judge Asante, in his dissenting opinion noted the connection of “fair and equitable treatment” with “full protection and security” and assumed that they each connoted the same level of treatment. He then considered the meaning of fair and equitable. He further stressed that the fair and equitable standard conformed to the international minimum standard.

The *Elettronica Sicula Spa (ELSI) (United States of America v. Italy)*, the ICJ held that the requirement for constant protection and security, as expressed in the FCN treaty between Italy and the United States, was not a warranty to a U.S. investor that no disturbance in any circumstances would occur. Furthermore, the ICJ held that the requisition by an Italian government entity of an insolvent Italian company partially owned by the U.S. investor did not violate the requirement. The Court also ruled that the requirement was to be measured by the “minimum international standard” that the requirement was to be measured by the “minimum international standard”.

⁵²² Subedi S P *International Investment Law: Reconciling Policy and Standard* (2012) 57.

⁵²³ *Id* at 63.

⁵²⁴ Lawal O S “Variability of fair and equitable treatment standard according to the level of development, governance capacity and resources of host countries” 2014 *Journal of International Commercial Law and Technology* 229.

⁵²⁵ *Ibid*.

⁵²⁶ Martin A M “Proportionality: an addition to the International Centre for the Settlement of Investment Disputes’ Fair and Equitable Treatment standard” 2014 *Boston College International and Comparative Law Review* 62-71.

⁵²⁷ *The Asian Agricultural Products Ltd v Republic of Sri Lanka* ICSID case No ARB/87/3 pages 580-655.

However, Judge Schwebel in his dissenting opinion reviewed the *travaux préparatoires* and preamble to the Supplementary Agreement. He held that one of the underlying principles of this Agreement and the Treaty it supplemented was that “of equitable treatment”.⁵²⁸ With this in mind, he concluded, *inter alia*, that a requisition order issued by the Italian authorities against ELSI deprived the shareholders of their rights of control, and constituted a violation of the principles of equitable treatment.⁵²⁹

It is not clear whether the FET standard is a higher standard than the general international minimum standard of treatment. However, the North American Free Trade Agreement⁵³⁰ Commission issued an interpretative statement indicating that the FET as used in NAFTA does not contemplate a higher standard than the international minimum standard in customary international investment law.

The FET standard is further said to be flexible because its content and application can be adjusted to accommodate new definitions.⁵³¹ For this reason, it is believed to have been the most invoked treaty standard in investor-state arbitration, which is present in almost every single claim brought by foreign investors against host states.⁵³²

The SADC BIT Model Template also makes provision for the fair and equitable treatment of foreign investors. It obligates the host state to accord to investments or investors of the other contracting state a fair and equitable treatment, in accordance with customary international law prescription on the treatment of foreign investors.⁵³³

The FET standard further prohibits the host state from abusing its powers. For example, the host state may not unreasonably refuse to meet its contractual obligations.⁵³⁴ The host state may also not abuse its powers to evade agreements with

⁵²⁸ *The Elettronica Sicula S.P.A. (ELSI) (US. V. Italy)*, 1989, I.C.J. page 15.

⁵²⁹ *Ibid.*

⁵³⁰ The North American Free Trade Agreement (hereinafter referred to as NAFTA).

⁵³¹ Lawal O S “Variability of fair and equitable treatment standard according to the level of development, governance capacity and resources of host countries” 2014 *Journal of International Commercial Law and Technology* 229.

⁵³² *Ibid.*

⁵³³ Article 5(1) of the SADC BIT Model Template.

⁵³⁴ Martin A M “Proportionality: an addition to the International Centre for the Settlement of Investment Disputes’ Fair and Equitable Treatment standard” 2014 *Boston College International and Comparative Law Review* 62.

investors, and/or act in bad faith during the execution of the contract.⁵³⁵ The violation of the FET standard is the allegation most used by foreign investors before the international investment tribunal.⁵³⁶ The host state may resort to justifying grounds, depending on the circumstances in a situation where it may not have granted the foreign investor a FET. In such cases, the host state may use justifying grounds such as consent, necessity, force *majeure*, distress and/or self-defence to the extent that they are proportionate and satisfy relevant standard of treatment.⁵³⁷

The FET standard contains of four elements, namely, fair procedure, non-discrimination, legitimate expectations, transparency and proportionality.⁵³⁸ Fair procedure refers to the notion of due process, denial of justice and the required judicial, and/or administrative proceedings for the protection of the rights and interests of foreign investors.⁵³⁹ A discriminatory intention of the host state may contribute to the finding of a violation of the FET standard.⁵⁴⁰ The host state may however justify the existence of discriminatory behaviour by proving the existence of reasonable grounds for such discrimination.⁵⁴¹ Foreign investors have a right to the protection of their legitimate expectations - by the wording of the preamble of an agreement, and by stability and consistency in the overall legal framework of the host state.⁵⁴²

The host state's legal regime must also be open and clear. This means that the entire relevant legal requirements for initiating, completing and successfully handling the investment must be easily accessible to foreign investors.⁵⁴³ The element of proportionality prohibits the host state from placing unreasonable or unnecessary strain on the foreign investment.⁵⁴⁴ In other words, the host state may only limit the rights and interests of a foreign investor if such limitation is reasonable and necessary.

⁵³⁵ *Ibid.*

⁵³⁶ Subedi S P *International Investment Law: Reconciling Policy and Standard* (2012) 62.

⁵³⁷ Jaemin L "Putting a Square Peg into a Round Hole? Assessment of the "Umbrella Clause" from the Perspective of Public International Law" 2015 *Chinese Journal of International Law* 362.

⁵³⁸ Segger M C *et al* (eds) *The Global Trade Law Series: Sustainable Development in World Trade Investment Law* (2011) 247-149.

⁵³⁹ *Id* at 246.

⁵⁴⁰ *Id* at 247.

⁵⁴¹ *Id* at 247.

⁵⁴² *Id* at 248.

⁵⁴³ *Ibid.*

⁵⁴⁴ *Id* at 249.

4.5.3 The national treatment standard

The national treatment standard generally prohibits discrimination based on the nationality of the foreign investor. Unlike the FET, the national treatment standard defines the required treatment by reference to the treatment accorded to other investments in similar circumstances.⁵⁴⁵ Unlike the MFN standard, the national treatment standard requires non-discrimination between domestic and foreign investors by the host state.⁵⁴⁶

The national treatment standard is a controversial one between civilised states. The main issue is the responsibility of a host state to treat foreign investors and nationals of the host state equally.⁵⁴⁷ The purpose of the national treatment standard is to grant foreign investors a treatment that is similar to that accorded domestic investors trading in the host state.⁵⁴⁸ For example, if state A accords its domestic investors a tax rate of fourteen per cent, the foreign investors of state B, which has an agreement with state A, are entitled to the same rate.

Generally, the host state has no inherent responsibility to afford a foreign investor more protection than its nationals do.⁵⁴⁹ This only comes into operation if the contracting states have entered into a BIT and inserted the national treatment clause. This provision prohibits the contracting states to a BIT from discriminating against the nationality of the other party.⁵⁵⁰ This means that foreign investors should be treated in the same way as domestic investors. This standard further puts an obligation on the state to be mindful of the investor's rights and interests. The scope of this standard is in the discretion of the parties, and varies from BIT to BIT.⁵⁵¹

⁵⁴⁵ Lawal O S "Variability of fair and equitable treatment standard according to the level of development, governance capacity and resources of host countries" 2014 *Journal of International Commercial Law and Technology* 229.

⁵⁴⁶ Article 4 (Commentary) of the SADC BIT Model Template
http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj1ksDPv_DNAhUEDMAKHe8dCokQFggaMAA&url=http%3A%2F%2Fwww.iisd.org%2Ffitn%2Fwp-content%2Fuploads%2F2012%2F10%2Fsadc-model-bit-template-final.pdf&usq=AFQjCNEPC_oz9mq7V0gEB0KXL8yVXrq80g&sig2=VNwDutREbbQA5mqdUV3W8Q&bvm=bv.126993452,d.d2s (Date of use: 13 July 2016).

⁵⁴⁷ Sornarajah M *The International Law on Foreign Investment* (2004) 233.

⁵⁴⁸ Subedi S P *International Investment Law: Reconciling Policy and Standard* (2012) 57.

⁵⁴⁹ Salacuse J W *The Law of Investment Treaties* (2010) 47.

⁵⁵⁰ Reinisch A *Standards of Investment Protection* (2008) 32.

⁵⁵¹ Sornarajah M *The International Law on Foreign Investment* (2004) 320.

The national treatment is a relative standard in that the violation of the foreign investor's right is determined by how the host state treats its domestic investors in like circumstances.⁵⁵² The 'like circumstance' component requires a determination of the similarities of circumstances of foreign and domestic investors.⁵⁵³ The criteria used to determine the 'like circumstances' criteria are generally limited to commercial considerations in business sectors.⁵⁵⁴

When determining whether the foreign investor has been subjected to less favourable treatment by the host state, the arbitration tribunals tend to focus on the effect of the measure on the foreign investor, rather than on the purpose or motive behind the measure taken.⁵⁵⁵ For this reason, foreign investors receive more protection, although this is at the detriment of the host state.

Article 2(2) (c) of the Charter of Economic Rights and Duties of States provides⁵⁵⁶ for the national treatment standard. However, the capital-exporting states argue that foreign investors should be treated in accordance with the international minimum standard only, rather than affording them national treatment.⁵⁵⁷ Sornarajah⁵⁵⁸ argues that the acceptance of the national treatment will reduce foreign investment protection, because it will leave them without any remedy in international law.⁵⁵⁹ The national treatment standard provides FDI protection at the pre-entry and post-entry stages. At the pre-entry stage, it creates a right of entry into the host state and a right of establishment of business.⁵⁶⁰ The post-entry stage affords the foreign investor a right to be treated equally with domestic investors.⁵⁶¹

The SADC Model BIT recommends the inclusion of a provision ensuring that each contracting state "accords foreign investors and their investments a treatment no less favourable than the treatment it accords, in 'like circumstances', to its own investors

⁵⁵² Segger M C *et al* (eds) *The Global Trade Law Series: Sustainable Development in World Trade Investment Law* (2011) 268.

⁵⁵³ *Ibid.*

⁵⁵⁴ *Id* at 269-270.

⁵⁵⁵ *Id* at 270.

⁵⁵⁶ The Charter of Economic Rights and Duties of States (hereinafter referred to as the CERDS).

⁵⁵⁷ Sornarajah M *The International Law on Foreign Investment* (2004) 233.

⁵⁵⁸ Sornarajah M is a professor of law at the National University of Singapore Law School.

⁵⁵⁹ Sornarajah M *The International Law on Foreign Investment* (2004) 233.

⁵⁶⁰ *Ibid.*

⁵⁶¹ *Ibid.*

and their investments with respect to the management, operation and disposition of investments in its territory”.⁵⁶² The SADC Model BIT also recommends, however, that SADC member states qualify this provision by scheduling a list of present and future non-conforming measures, sectors and activities, which will be permanently excluded from the scope of the national treatment provision.⁵⁶³

The SADC Protocol on Finance and Investment⁵⁶⁴ makes an exception to the national treatment. It provides that all SADC member states must establish conditions favouring the participation of least-developed countries of the SADC in the economic integration process, based on the standards of non-reciprocity and mutual benefit.⁵⁶⁵

4.5.4 The full protection and security standard

The full protection and security standard is not as popular as the other standards of treatment. For this reason, it is less frequently applied during investment dispute resolutions.⁵⁶⁶ There is also a paucity of cases or literature dealing with this standard. In a broad sense, the standard of full protection and security refers to the protection of rights of property and contract.⁵⁶⁷ The full protection and security standard prohibits the states from using force or violent means against foreign investors’ investments.⁵⁶⁸

The full protection and security standard further prohibits the host state from impairing the FDI.⁵⁶⁹ This standard requires the host state to avoid the use of unreasonable violence or force against the foreign investor’s property, if such violence or force cannot be avoided.⁵⁷⁰ In other words, the obligation against the host state is not to refrain from causing damage, but to exercise due diligence, or to take reasonable steps to prevent

⁵⁶² Woolfrey S “The SADC Model Bilateral Investment Treaty Template: Towards a new standard of investor protection in southern Africa” 2014 *Trade Law Centre* 5.

⁵⁶³ *Ibid.*

⁵⁶⁴ Southern African Development Community Protocol on Finance and Investment, 2000 (hereinafter referred to as the SADC Protocol on Finance and Investment)
https://www.google.co.za/?gws_rd=ssl#q=sadc+protocol+on+finance+and+investment (Date of use: 13 July 2016).

⁵⁶⁵ Article 20 (1) of the SADC Protocol on Finance and Investment.

⁵⁶⁶ Reinisch A “*Standards of Treatment Protection*” (2008) 131.

⁵⁶⁷ Vandevelde K J “Model Bilateral Investment Treaty: the way forward” 2015 *Southwestern Journal of International Law* 313.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Ibid.*

⁵⁷⁰ Sornarajah M *The International Law on Foreign Investment* (2004) 237.

the damage against the property of a foreign investor.⁵⁷¹ There must be a causal link between the action of the host state and the investment prejudice suffered by the FDI.⁵⁷² This means that the state is only liable for its own actions and not those of a third party.

The violation of this standard can only be used as a last resort, and the foreign investor is entitled to compensation.⁵⁷³ However, this provision only comes into effect if the contracting states to a BIT provide for it, it is not inherent.⁵⁷⁴ It is not clear whether the full protection and security standard is a subjective or an objective standard. However, the due diligence obligation upon the host state means that the host state is required to take all reasonable measures of prevention which a host state in similar circumstances is expected to take.⁵⁷⁵

The application of the full protection and security standard may overlap with the FET standard. Examples of these overlapping applications may occur in the following circumstance:

- (a) just like the FET standard, the full protection and security standard may be breached, even if there is no physical impairment of the investors' investment;⁵⁷⁶
- (b) in the case of *Occidental Exploration and Production Company v the Republic of Ecuador*,⁵⁷⁷ the tribunal held that if it is established that there has been a violation of the FET standard, it becomes moot to enquire whether there had in addition been a violation of the full protection and security standard.⁵⁷⁸ This is because the treatment that is not fair and equitable automatically entails an absence of full protection and security.⁵⁷⁹

⁵⁷¹ Reinisch A "Standards of Treatment Protection" (2008) 138.

⁵⁷² *Ibid.*

⁵⁷³ *Ibid.*

⁵⁷⁴ *Id* at 236.

⁵⁷⁵ Reinisch A "Standards of Treatment Protection" (2008) 140.

⁵⁷⁶ *Id* at para 146.

⁵⁷⁷ *The Occidental Exploration and Production Company v the Republic of Ecuador* LCIA, case no UN 3467/2004 para 183.

⁵⁷⁸ *Id* at 187.

⁵⁷⁹ *Ibid.*

4.6 THE PROTECTION OF FOREIGN DIRECT INVESTMENT THROUGH DISPUTE RESOLUTION

4.6.1 The investor-state dispute resolution: its nature, scope and content

The protection of foreign investment may be effected by an arbitration clause by the host state and the foreign investor or the contracting states. The arbitration clause allows the choice of neutral forum for the settlement of disputes that may arise from an investment agreement.⁵⁸⁰ As a result, access to justice can be improved significantly with the implementation of dispute resolution.⁵⁸¹

Investment disputes brought under the BITs are subject to unique so-called international dispute settlement proceedings.⁵⁸² Various dispute resolution mechanisms exist, such as negotiation, consultation, conciliation, use of good offices, panel procedures, arbitration, judicial settlement, and reference to the International Court of Justice.⁵⁸³ Under the applicable FDI law, the provisions in the BITs allow individual investors to initiate their own legal action directly against the host state, to claim for violation of certain provisions of the BITs.⁵⁸⁴

Dispute resolution mechanisms are important because they allow an aggrieved party to seek remedy. Most modern BITs contain dispute settlement clauses, providing for different forms of settling investment disputes between states and foreign investors of other contracting states.⁵⁸⁵

Formal dispute resolution requires the parties to submit their disputes for adjudication;⁵⁸⁶ usually takes place in a court setting,⁵⁸⁷ with the ICJ being responsible for the adjudication of foreign investment disputes at an international level.

⁵⁸⁰ Sornarajah M *The International Law on Foreign Investment* (2004) 413.

⁵⁸¹ Collins D "Alternative dispute resolution for stakeholders in international investment law" 2012 *Journal of International Economic Law* 675.

⁵⁸² Jaemin L "Putting a Square Peg into a Round Hole? Assessment of the 'Umbrella Clause' from the Perspective of Public International Law" 2015 *Chinese Journal of International Law* 346.

⁵⁸³ United Nations *The Treaty Handbook* (2006) 21.

⁵⁸⁴ *Ibid.*

⁵⁸⁵ Reinisch A "How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?" 2011 *Journal of International Dispute Settlement* 116.

⁵⁸⁶ Lin T M "Chinese attitudes toward third-party dispute resolution in international law" 2016 *International Law and Politics* 593.

⁵⁸⁷ *Ibid.*

The ICJ is a judicial branch of the United Nations and was established by the Charter of the United Nations as its principal judicial organ.⁵⁸⁸ The ICJ consists of independent judges,⁵⁸⁹ fifteen members⁵⁹⁰ who are selected by the General Assembly, and the Security Council.⁵⁹¹ There are many advantages to resolving disputes through in-court litigation.⁵⁹² For example, the procedures are clear, there are standardised rules, the decision is out of the parties' hands, and there is a right to appeal.⁵⁹³

Despite the advantages of formal dispute resolution mechanisms, the downside is that court proceedings can often take years until a judgment is passed, during which time attorneys' fees may accumulate.⁵⁹⁴ For this reason, parties to an investment dispute may opt for informal dispute resolution mechanisms such as mediation and arbitration, which, in recent years, have become increasingly popular because of their confidential nature and time and cost effectiveness.⁵⁹⁵

In terms of the informal mechanism (also known as alternative dispute resolution), the parties submit their dispute to the arbitral tribunal, or to the ICSID, which was established in terms of the 1930 Hague Agreement.⁵⁹⁶ It functions within the Permanent Court of Arbitration.⁵⁹⁷ The PCA is an inter-governmental organisation that provides various dispute resolutions to the international community⁵⁹⁸ Apart from formal dispute mechanisms; the PCA also provides informal dispute resolutions, such as mediation and conciliation.⁵⁹⁹

Mediation can be defined as a method of non-binding dispute resolution involving a neutral third party, that tries to help the disputing parties reach a mutually agreeable

⁵⁸⁸ Article 1 of the Statute of the International Court of Justice <http://www.bing.com/search?q=tge+international+court+of+justiuce&src=IE-TopResult&FORM=IETR02&conversationid> (Date of use: 04 October 2016).

⁵⁸⁹ *Id* at Article 2.

⁵⁹⁰ *Id* at Article 3.

⁵⁹¹ *Id* at Article 4.

⁵⁹² Lin T M "Chinese attitudes toward third-party dispute resolution in international law" 2016 *International Law and Politics* 583.

⁵⁹³ *Ibid*.

⁵⁹⁴ *Ibid*.

⁵⁹⁵ *Ibid*.

⁵⁹⁶ Bank for International Settlement "Hague Arbitral Tribunal" http://www.bis.org/about/arb_trib.htm (Date of use: 4 October 2016).

⁵⁹⁷ The Permanent Court of Arbitration (hereinafter referred to as the PCA).

⁵⁹⁸ The Permanent Court of Arbitration <https://pca-cpa.org/en/home/> (Date of use: 04 October 2016).

⁵⁹⁹ *Ibid*.

solution.⁶⁰⁰ The third party, who is not personally involved in the dispute, is chosen by and must be acceptable to both the disputing parties.⁶⁰¹ The mediator's decision is binding only if the parties come to a mutually agreeable settlement.⁶⁰² Arbitration unlike mediation is binding to both parties. Arbitration is a dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute.⁶⁰³

Although these mechanisms vary, they are typically not tied to a fixed procedural framework because they favour practical solutions that require compromise and negotiation.⁶⁰⁴ A common method of informal dispute resolution is mediation.

In an informal dispute resolution, the parties have the discretion to choose the mediator or arbitrator, as well as to change procedural rules, such as the language of the proceedings and the location of the hearings.⁶⁰⁵ The informal dispute resolution entails taking the matter to arbitration, mediation or conciliation.⁶⁰⁶ The informal dispute resolution processes are likely to be less costly than domestic courts or international arbitration, because they are not as legalised and do not require the establishment of liability, and accompanying specialised legal counsel.⁶⁰⁷

The lack of autonomy may sometimes be problematic for the following reasons. Firstly, it prevents foreign investors from experimenting with different provisions from various third-party treaties.⁶⁰⁸ There do not seem to be significant reasons for allowing foreign investors to select only a single set of more generous dispute settlement provisions from just one third-party treaty.⁶⁰⁹ However, allowing foreign investors to use multiple provisions from multiple treaties renders the MFN clause wholly effective, although it

⁶⁰⁰ Lin T M "Chinese attitudes toward third-party dispute resolution in international law" 2016 *International Law and Politics* 586.

⁶⁰¹ *Ibid.*

⁶⁰² *Ibid.*

⁶⁰³ *Ibid.*

⁶⁰⁴ *Ibid.*

⁶⁰⁵ *Id* at 584.

⁶⁰⁶ Collins D "Alternative dispute resolution for stakeholders in international investment law" 2012 *Journal of international Economic Law* 675.

⁶⁰⁷ *Ibid.*

⁶⁰⁸ Junngam N "An MFN clause and BIT dispute settlement: a host state's implied consent to arbitration by reference" 2010 *UCLA Journal of International Law and Foreign Affairs* 405-406.

⁶⁰⁹ *Ibid.*

could be considered partly inconsistent with the interpretative rule enshrined in the VC on the Law of Treaties because it disregards a context of the BIT.⁶¹⁰

Second, the absence of a waiting period with regard to the exhaustion of local remedies is more favourable.⁶¹¹ Third, the local courts may, in certain circumstances, provide less favourable remedies than international arbitration.⁶¹² Fourth, other clauses require the parties to first attempt to settle the dispute amicably, the foreign investor to first submit the dispute to domestic courts for a certain period, and that the dispute has not been resolved.⁶¹³ Lastly, some of the BIT clauses narrow the scope of the definition of an investment and an investment dispute.⁶¹⁴

It is clear that although the BITs offer protection of foreign investment, certain provisions of BITs severely limit the availability of direct arbitration between investors and host states. For example, the requirement that foreign investors exhaust local remedies before they may approach international institutions is a disadvantage.⁶¹⁵

Investment may also be protected through the ICSID. The main function of the ICSID is to resolve foreign investment disputes at an international level.⁶¹⁶ It is within the scope of the ICSID Convention to promote international investment; hence, it provides mechanisms to assist in the resolution of disputes related to such investments.⁶¹⁷ The ICSID does not have an automatic jurisdiction over foreign investment disputes. For this reason, consent is the key element of dispute resolution under the ICSID and Article 25 (1) of the ICSID Convention has established its importance.

The truth is that international law cannot be enforced in domestic courts, no matter how effective the domestic legal system is.⁶¹⁸ This is one of the main reasons why the ICSID was created. Article (1) prohibits parties to the arbitration from withdrawing consent

⁶¹⁰ *Ibid.*

⁶¹¹ *Ibid.*

⁶¹² *Ibid.*

⁶¹³ Reinisch A "How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?" 2011 *Journal of International Dispute Settlement* 116.

⁶¹⁴ *Ibid.*

⁶¹⁵ *Ibid.*

⁶¹⁶ Bashmill H "Foreign investment disputes settlement under the ICSID and the protection of FDI" 2016 *Journal of Banking and Commerce* 3.

⁶¹⁷ Article 4 of the SADC Protocol on Finance and Investment.

⁶¹⁸ Chase P H "TTIP, investor-state dispute settlement and the rule of law" 2015 *European View*) 223.

unilaterally. Article 26 grants the host state powers to require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the ICSID Convention.

Article 25 (1) also establishes jurisdiction of the ICSID over any legal dispute arising directly from an investment between a host state and the foreign investor. The ICSID Convention provides for the ICSID arbitration rules, in terms of which arbitration will be based on the laws of the member state and the relevant foreign investment law.⁶¹⁹

Harten lists the advantages of arbitration as follows:

- (i) "Investors are authorised to bring claims against states in relation to most or all aspects of the treaty rather than a more limited class of potential disputes, such as those involving the amount of compensation to be paid in the event of an expropriation;
- (ii) Investors can bring claims in arbitration forums at which voting power is concentrated in the major capital-exporting states (e.g. the World Bank) or an international business organisation (e.g. the International Chamber of Commerce);
- (iii) Investors can bring claims without having to exhaust local remedies in the host state, regardless of whether those remedies would deliver justice;
- (iv) Investors can submit contractual disputes with the host state or a state entity to the arbitration mechanism under the investment treaty, even where the contract itself requires the resolution of disputes in another forum;
- (v) Arbitrators are authorized to regulate and discipline states based on broadly framed standards, such as protection from unfair or inequitable" treatment and from expropriation or deprivation;
- (vi) Arbitrators are authorized to review the conduct of virtually any branch or entity of the state; and
- (vii) Arbitrators are authorized to award monetary compensation, as opposed to conventional public law remedies, where the state is found retrospectively to have violated its treaty obligations."⁶²⁰

⁶¹⁹ Bashmill H "Foreign investment dispute settlement under the ICSID and the protection of FDI" 2016 *Journal of Banking and Commerce* 3.

⁶²⁰ Harten G V "Five justifications for investment treaties: a critical discussion" 2010 *Trade Law and Development* 26-27.

The SADC Protocol on Finance and Investment⁶²¹ also provides for dispute resolution in Article 28. The parties concerned may either refer the matter to the SADC Tribunal,⁶²² the ICSID, an international arbitrator, or an ad hoc arbitral tribunal to be appointed by special agreement or Arbitration Rules of the United Nations Commission on International Trade Law.⁶²³ However, they must first exhaust all local remedies before they can submit a claim to international arbitration.⁶²⁴

4.7 THE PROTECTION OF FOREIGN INVESTMENT: THE EXAMPLE OF CHINA

This section looks at FDI protection in China. It focuses on why China is used as an example in the study, where it is in terms of legal framework protecting foreign investment, and how these legal frameworks protect FDI.

The reason why China was chosen for the study is that it has four characteristics in common with South Africa. Firstly, both are developing countries; second, they are both member states of the BRICS, third, like South Africa, China is currently in the process of reviewing its foreign investment law,⁶²⁵ and finally, China was also isolated from the world market, although its isolation was self-imposed.⁶²⁶ China is one of the largest countries with a high inflow of FDI and has more than 100 BITs in force to protect foreign investment.⁶²⁷

However, the first generation of Chinese BITs did not adequately protect the foreign investor,⁶²⁸ which had a significant effect on the economy of China.⁶²⁹ When this was

⁶²¹ Southern African Development Community Protocol on finance and investment (hereinafter referred to as the SADC Protocol on Finance and Investment) http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance_Investment2006.pdf (Date of use: 12 May 2016).

⁶²² Article 28 (2) (a) of the SADC Protocol on Finance and Investment.

⁶²³ Article 28(2) (c).

⁶²⁴ Article 28 (1).

⁶²⁵ China Briefing "China's Upcoming 2016 Foreign Investment Law Revisions To Boost Service Sector"

<http://www.china-briefing.com/news/2016/04/04/chinas-upcoming-2016-foreign-investment-law-revisions-to-boost-service-sector.html> (Date of use: 15 September 2016).

⁶²⁶ Berger A "China's new bilateral investment treaty programme" https://www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf (Date of use: 29 September 2016).

⁶²⁷ UNCTAD "Number of IIAs per economy" <http://investmentpolicyhub.unctad.org/IIA/liaByCountry#iialInnerMenu> (Date of use: 15 September 2016).

⁶²⁸ Berger A "China's new bilateral investment treaty programme" https://www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf (Date of use: 29 September 2016).

⁶²⁹ *Ibid.*

realised and China decided to pro-actively embark on the negotiation of new liberal investment treaties.⁶³⁰ It further initiated a gradual shift towards stronger provisions for substantive and procedural foreign investment protection.⁶³¹ Today, Chinese BITs contain almost all standard provisions found in mainstream European-Country BITs.⁶³²

The Investopedia⁶³³ mentions six factors that influence foreign investment in China. They are: capital availability, competitiveness, regulatory environment, the economic stability, positive market and business climate, and openness to regional and international trade.⁶³⁴ Since 2000, when China overtook the United States as the world largest recipient of foreign capital, China's FDI inflow has increased.⁶³⁵ China's inflow of FDI is dependent on infrastructures such as roads and bridges, resources productivity and development of the business value chain.⁶³⁶ These have enabled foreign investors to generate profit with regard to their investment.

The size of the Chinese population presents the promise of economic growth.⁶³⁷ China is the world's largest nation with a population of more than 1, 35 billion⁶³⁸ with the world's fastest growing and second largest economy.⁶³⁹ Like South Africa China is currently embarking on a process of reforming and reviewing its foreign investment law. China has published a Draft Foreign Investment Law of the Peoples' Republic of China, Draft for Comments,⁶⁴⁰ on 19 January 2015 for public comments.⁶⁴¹ It will repeal

⁶³⁰ *Ibid.*

⁶³¹ *Ibid.*

⁶³² *Ibid.*

⁶³³ Investopedia is the largest financial education website in the world. It is powered by a team of data scientists and financial experts. Investopedia offers timely, trusted and actionable financial information for every investor, from early investors to financial advisors to high net worth individuals.

About Us | Investopedia <http://www.investopedia.com/corp/about.aspx#ixzz4PhCTMzf0>

(Date of use: 11 November 2016).

⁶³⁴ Dumon M "The Top 6 Factors That Drive Investment in China"

<http://www.investopedia.com/articles/economics/09/factors-drive-investment-in-china.asp> (Date of use: 15 September 2016).

⁶³⁵ *Ibid.*

⁶³⁶ *Ibid.*

⁶³⁷ *Ibid.*

⁶³⁸ Worldometers "China Population (Live)" <http://www.worldometers.info/world-population/china-population/> (Date of use: 17 September 2016).

⁶³⁹ Dumon M "The Top 6 Factors That Drive Investment in China"

<http://www.investopedia.com/articles/economics/09/factors-drive-investment-in-china.asp> (Date of use: 15 September 2016).

⁶⁴⁰ https://www.google.co.za/?gws_rd=ssl#q=the+china+draft+foreign+investment+law+pdf

⁶⁴¹ The Foreign Investment Law of the Peoples' Republic of China, Draft for Comments (hereinafter referred to as the China's Draft Investment Law)

the Sino-Foreign Equity Joint Venture Law, the Sino-Foreign Cooperative Joint Venture Law, and the Wholly Foreign-Owned Enterprise Law.⁶⁴² These were laws that regulated FDI in China and that are currently in force until such time that the China Draft Foreign Investment Law repeals them.

The China Draft Foreign Investment Law is aimed at regulating foreign Protection of Investment Activities which includes *inter alia* foreign investment protection.⁶⁴³ For more than two decades, China has been advocating the protection of foreign investment⁶⁴⁴ *inter alia* by acceding to the ICSID Convention in 1993.⁶⁴⁵ In this regard, China notified the ICSID Secretariat that it would only agree to refer issues of compensation for expropriation to ICSID arbitration and that consent for arbitration would be given on a case-by-case basis.⁶⁴⁶ The treaties signed in the following years included the ICSID arbitration clause in line with that notice.⁶⁴⁷

Chapter 7 of the China Draft Foreign Investment Law deals specifically with the protection of foreign investment. Foreign investors are protected against *inter alia* the illegal or *ultra vires* conduct by a state organ.⁶⁴⁸ Foreign investors are also allowed free inbound and outbound transfer of their legal property.⁶⁴⁹ Protected property include capital contributions, profits, income from asset disposal or compensations and/or indemnities acquired in terms of the law.⁶⁵⁰

The China Draft Foreign Investment Law also covers foreign investment protection of levy, expropriation, state compensation, transfer and the intellectual property right.⁶⁵¹ The China Draft Foreign Investment Law further protects foreign investment by way of

https://www.google.co.za/?gws_rd=ssl#q=the+china+draft+foreign+investment+law+pdf (Date of use: 19 September 2016).

⁶⁴² *Ibid.*

⁶⁴³ *Ibid.*

⁶⁴⁴ Wanqiang L I "Chinese Foreign Investment Laws: A Review from the Perspective of Policy-oriented Jurisprudence" 2011 *Asia Pacific Law Review: LexisNexis* 44.

⁶⁴⁵ *Ibid.*

⁶⁴⁶ *Ibid.*

⁶⁴⁷ *Ibid.*

⁶⁴⁸ Article 113 of the China Draft Investment Law.

⁶⁴⁹ *Id* at Article 114.

⁶⁵⁰ *Ibid.*

⁶⁵¹ Lehman E *et al* "China's Foreign Investment Law is getting ready to come out" <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/foreign-investment/chinas-foreign-investment-law-is-getting-ready-to-come-out.html> (Date of use: 20 September 2016).

investment dispute resolution.⁶⁵² The 2008 Organisation for Economic Co-operation and Development Investment Policy Review of China⁶⁵³ aligns inward FDI flows more closely with national priorities, including upgrading industrial sophistication, supporting innovation, setting up outsourcing industries and developing poorer hinterland regions.⁶⁵⁴ The economic growth of China has also been strengthened when it decided to Go Global in 2001.⁶⁵⁵

These policies have been successful in attracting and promoting foreign investment in China.⁶⁵⁶ The China Draft Foreign Investment Law is regarded as a positive sign of the Chinese government's determination to relax restrictions on foreign investment.⁶⁵⁷ Foreign investor confidence has been sustained by China's economic strength.⁶⁵⁸

Currently, foreign investment in China is regulated by the Catalogue of Industries for Guiding Foreign Investment⁶⁵⁹ and the Catalogue of Special Administrative Measures for Foreign Investment,⁶⁶⁰ which are published by the Minister of Commerce and the National Development Reform Commission.⁶⁶¹

Although China's domestic laws provides for the protection of foreign investments, a more systematic and stronger protection for foreign investors is reflected in its investment treaties.⁶⁶² China currently has more than 100 BITs in place, which were

⁶⁵² *Ibid.*

⁶⁵³ Organisation for Economic Co-operation and Development (Hereinafter referred to as the 2008 OECD Investment Policy Review). <http://www.oecd.org/> (Date of use: 20 September 2016).

⁶⁵⁴ Davies K "China Investment Policy: an Update" 2013 *OECD Working on International Investment* 8.

⁶⁵⁵ Going global policy is a policy which by its nature encourages domestic investors and traders to target the international market rather than the domestic market.

Katarzyna T *et al* "International business strategy reasons and forms of expansion into foreign markets" 2013 *Poland University International Conference* 1006.

⁶⁵⁶ Davies K "China Investment Policy: an Update" 2013 *OECD Working on International Investment* 10.

⁶⁵⁷ Brown M "Draft Foreign Investment Law: Fundamental Changes to Foreign Investment Regime in China" https://www.google.co.za/?gws_rd=ssl#q=draft+foreign+investment+law+of+prc (Date of use: 19 September 2016).

⁶⁵⁸ Davies K "China Investment Policy: an Update" 2013 *OECD Working on International Investment* 7.

⁶⁵⁹ The China Catalogue of Industries for Guiding Foreign Investment (hereinafter referred to as the China Foreign Investment Catalogue).

⁶⁶⁰ The Catalogue of Special Administrative Measures for Foreign Investment (hereinafter referred to as the Foreign Investment Special Catalogue).

⁶⁶¹ Brown M "Draft Foreign Investment Law: Fundamental Changes to Foreign Investment Regime in China" https://www.google.co.za/?gws_rd=ssl#q=draft+foreign+investment+law+of+prc (Date of use: 19 September 2016).

⁶⁶² Wanqiang L I "Chinese Foreign Investment Laws: A Review from the Perspective of Policy-oriented Jurisprudence" 2011 *Asia Pacific Law Review: LexisNexis* 40.

negotiated and entered into under its traditional BIT model.⁶⁶³ China and the USA are currently in the process of negotiating and concluding a BIT. This is an important milestone for China because the US-China BIT⁶⁶⁴ will break away from the Chinese traditional BIT model in at least two significant respects.⁶⁶⁵

Firstly, the US-China BIT includes a 'negative list' that will be released by the State Council of the People's Republic of China.⁶⁶⁶ The State Council is also known as China's Central People's Government, and it is the highest executive organ of state power and administration.⁶⁶⁷ The negative list will set out industrial sectors in which foreign investment is limited, as well as investment thresholds for foreign investment.⁶⁶⁸ Sectors on the negative list will be off-limits to each party.

The negative list will reduce the number of sectors, which may form the basis of market access under pre-establishment national treatment.⁶⁶⁹ Foreign investments outside of the negative list will enjoy the same national treatment as domestic investors and may register with the China Administration for Industry and Commerce⁶⁷⁰ directly.⁶⁷¹ Currently, foreign investments require governmental approval.⁶⁷² The China Draft Foreign Investment Law has done away with this requirement.⁶⁷³ In other words,

⁶⁶³ The US-China BIT is still under negotiation and it has not come into force yet.

⁶⁶⁴ The United States-China Bilateral Investment Treaty (hereinafter referred to as the US-China BIT. <http://www.uscc.gov/Research/policy-considerations-negotiating-us-china-bilateral-investment-treaty> (Date of use: 21 September 2016).

⁶⁶⁵ Cheek M "Why a U.S.-China Bilateral Investment Treaty Matters" <http://www.investmentpolicycentral.com/content/why-us-china-bilateral-investment-treaty-matters> (Date of use: 20 September 2016).

⁶⁶⁶ Brown M "Draft Foreign Investment Law: Fundamental Changes to Foreign Investment Regime in China" https://www.google.co.za/?gws_rd=ssl#q=draft+foreign+investment+law+of+prc (Date of use: 19 September 2016).

⁶⁶⁷ Liao T *et al* "China: China's Draft Foreign Investment Law: The Proposed New Regulatory Regime For Foreign Investments" <http://www.mondaq.com/china/x/449244/Inward+Foreign+Investment/Chinas+Draft+Foreign+Investment+Law> (Date of use: 21 September 2016).

⁶⁶⁸ *Ibid.*

⁶⁶⁹ Gloudeman L & Salidjanova N "Policy Considerations for Negotiating a U.S.-China Bilateral Investment 2016 *US-China Economic and Security Review Commission Staff Research Report 12*.

⁶⁷⁰ The China Administration for Industry and Commerce (Hereinafter referred to as the China AIC). The China AICs performs a variety of roles in governing industry and commerce in within its jurisdiction http://www.chinacheckup.com/questions/china-aic#What_does_a_China_AIC_do (Date of use: 21 September 2016).

⁶⁷¹ Brown M "Draft Foreign Investment Law: Fundamental Changes to Foreign Investment Regime in China" https://www.google.co.za/?gws_rd=ssl#q=draft+foreign+investment+law+of+prc (Date of use: 19 September 2016).

⁶⁷² MMLC Group "Foreign Investment Law to boost its service sector" <https://www.hg.org/article.asp?id=38046> (Date of use: 21 September 2016).

⁶⁷³ *Ibid.*

foreign investors will no longer be subject to a separate regulatory regime, but will receive the same treatment as domestic investors.⁶⁷⁴ Therefore, the adoption of the pre-establishment national treatment principle for foreign investment ensures there is no need for foreign investors to apply for approval unless the investment falls within the negative list.⁶⁷⁵

In terms of the China Draft Investment Law, foreign investors will no longer be subject to a separate regulatory regime from domestic investors, but will be given the same treatment as domestic investors.⁶⁷⁶ Therefore, the adoption of the pre-establishment national treatment principle for foreign investment ensures that foreign investors need not apply for approval, unless the investment falls within the parameters of the negative list.⁶⁷⁷ By agreeing to a 'negative list' approach, China has signalled its willingness to allow foreign investment in all industries and sectors of its economy.⁶⁷⁸ The US-China BIT also contains all the standard provisions in the international BIT model.⁶⁷⁹

Secondly, the US-China BIT signals China's willingness to allow non-discriminatory access to its market at all stages of investment.⁶⁸⁰ This would protect pre-Protection of Investment Activities and is expected to open the Chinese market to more US companies and afford greater certainty for investments in various sectors.⁶⁸¹ The US-China BIT presents the most significant opportunity for companies of both parties to address barriers in their respective market.⁶⁸² The number of BITs that China has entered into shows its willingness and openness to international trade. It is clear from the above discussion that China has taken extra steps to promote and protect foreign investment in its territory.

⁶⁷⁴ *Ibid.*

⁶⁷⁵ *Ibid.*

⁶⁷⁶ *Ibid.*

⁶⁷⁷ *Ibid.*

⁶⁷⁸ Cheek M "Why a U.S.-China Bilateral Investment Treaty Matters"

<http://www.investmentpolicycentral.com/content/why-us-china-bilateral-investment-treaty-matters> (Date of use: 20 September 2016).

⁶⁷⁹ These provisions are discussed in detail in this chapter and will not be repeated here.

⁶⁸⁰ Cheek M "Why a U.S.-China Bilateral Investment Treaty Matters"

<http://www.investmentpolicycentral.com/content/why-us-china-bilateral-investment-treaty-matters> (Date of use: 20 September 2016).

⁶⁸¹ *Ibid.*

⁶⁸² *Ibid.*

4.8 OTHER INTERNATIONAL INSTITUTIONS THAT INDIRECTLY PLAY A ROLE IN THE PROTECTION AND PROMOTION OF FOREIGN DIRECT INVESTMENT

4.8.1 Introduction

Various international institutions play a role in the promotion and protection of FDI. These institutions do not have objectives that deal directly with the promotion and protection of FDI. Their protection emanates from their host and home countries being member states to these international institutions.

4.8.2 The United Nations

The UN came into being by the Charter of the United Nations.⁶⁸³ The Charter of the UN is a multinational treaty, which serves as the Constitution of the UN and binds all member states.⁶⁸⁴ The UN is responsible for the promotion of economic development through the Economic and Social Council.⁶⁸⁵ The main task of the Economic and Social Council⁶⁸⁶ is to make recommendations about economic matters, and to draft Conventions for submissions at the UN General Assembly.⁶⁸⁷

4.8.3 The United Nations, General Assembly

The UN General Assembly is an organ of the United Nations. It is responsible for facilitating discussions and making recommendations regarding economic matters.⁶⁸⁸ In this regard, it has made various resolutions on international economic matters through the Charter of Economic Rights and Duties of States.⁶⁸⁹ The Charter of Economic Rights and Duties of States focuses on the development of friendly relations among nations and the achievement of international co-operation in solving international problems in the economic and social sectors.⁶⁹⁰ Chapter one of the Charter of Economic Rights and Duties deals with the Fundamentals of the Charter.

It deals with, *inter alia*,

1. Equal rights and self-determination of peoples,

⁶⁸³ Charter of the United Nations (hereafter Charter of the UN).

⁶⁸⁴ Dugard J *International Law: A South African Perspective* (2012) 25.

⁶⁸⁵ Booysen H *Principles of International Trade Law as a Monistic System* (2007) 124.

⁶⁸⁶ Economic and Social Council (hereinafter referred to as the ESC).

⁶⁸⁷ Booysen H *Principles of International Trade Law as a Monistic System* (2007) 124-125.

⁶⁸⁸ *Id* at 125.

⁶⁸⁹ *Ibid*.

⁶⁹⁰ Preamble of the General Assembly Charter of Economic Rights and Duties of States <http://www.un-documents.net/a29r3281.htm> (Date of use: 25 October 2016).

2. Peaceful settlement of disputes,
3. Remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development,
4. Fulfilment in good faith of international obligations,
5. Respect for human rights and international obligations and
6. International co-operation for development.⁶⁹¹

Chapter 2(2)(a) gives states a right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations. However, it does not oblige states to grant preferential treatment to foreign investors. As said above, the obligation to provide foreign investors a preferential treatment only arises out of an agreement between the parties. Because of the nature of the Charter on Economic Rights and Duties of States resolutions, they merely create ideals rather than a legal framework within which international trade can be conducted.⁶⁹²

4.8.4 The United Nations Commission on International Trade Law

The United Nations Commission on International Trade Law⁶⁹³ was established by the UN General Assembly.⁶⁹⁴ Its general function is to ensure the harmonisation and unification of international trade law.⁶⁹⁵ It provides recommendations and guidelines regarding international conventions, model and uniform laws for acceptance by the states.⁶⁹⁶ These conventions and model laws can be applied to and by individual traders and investors.⁶⁹⁷

The UNCITRAL plays a role, firstly, in promoting wider participation in existing international conventions.⁶⁹⁸ Second, it is involved in the preparation and adoption of new international conventions, models laws and uniform laws.⁶⁹⁹ Third, it promotes wider acceptance of the international trade terms and customs, which play a role in

⁶⁹¹ Chapter 1 of the General Assembly Charter on Economic Rights and Duties of States.

⁶⁹² Booyesen H *Principles of International Trade law as a Monistic System* (2007) 124-125.

⁶⁹³ The United Nations Commission on International Trade Law (hereinafter referred to as the UNCINTRAL).

⁶⁹⁴ Booyesen H *Principles of International Trade Law as a Monistic System* (2007) 128.

⁶⁹⁵ *Ibid.*

⁶⁹⁶ *Ibid.*

⁶⁹⁷ *Ibid.*

⁶⁹⁸ *Ibid.*

⁶⁹⁹ *Id* at 128-129.

ensuring a uniform interpretation and application of international conventions, domestic laws and modern legal developments, including case law.⁷⁰⁰

4.8.5 The International Monetary Fund

The International Monetary Fund⁷⁰¹ constitutes a core sector of international economic law. International trade and international business rest on cross boarder payment and capital movements, which as a rule affect two or more currency areas.⁷⁰² In 1944 at the Conference of Bretton Woods, the creation of the IMF, its Articles of Agreement and the creation of the World Bank were accepted.⁷⁰³

The aim of the IMF is to create an international monetary order based on the free convertibility of currencies.⁷⁰⁴ The IMF also ensures free movement of payment and capital and payments in conformity with the requirement of internal trade.⁷⁰⁵ Furthermore, the IMF oversees exchange rate practices of states and assists governments with balance of payments problems by selling them foreign currencies.⁷⁰⁶ The IMF has a flexible system of international payments in place, which seek to eliminate restrictions that may hamper the growth of the world trade.⁷⁰⁷

This in turn promotes international trade and investment by improving the legal framework within which trade and investment can be conducted.⁷⁰⁸ If an international businessman or foreign investor is unable to pay for imports, business is hampered. For this reason, foreign investors benefit from the IMF because states can afford to repay loans against lower interest rates.⁷⁰⁹ The IMF ensures that foreign investors or importers are able to conduct business by obliging states not to impose restrictions.⁷¹⁰ However, an individual foreign investor or trader does not obtain rights directly from

⁷⁰⁰ *Id* at 129.

⁷⁰¹ The International Monetary Fund (hereinafter referred to as the IMF).

⁷⁰² Herdegen M *Principles of International Economic law* (2013) 247.

⁷⁰³ *Ibid.*

⁷⁰⁴ *Id* at 247.

⁷⁰⁵ *Ibid.*

⁷⁰⁶ Booyesen H *Principles of International Trade Law as a Monistic System* (2007) 131.

⁷⁰⁷ *Ibid.*

⁷⁰⁸ *Ibid.*

⁷⁰⁹ *Ibid.*

⁷¹⁰ *Ibid.*

the IMF Articles of Agreement, and may also not enforce their rights in domestic courts.⁷¹¹

4.8.6 The World Bank

The World Bank is an important institution that assists in the economic development of its member states. It acts as a source of financial and technical assistance to developing countries around the world.⁷¹² It provides loans and technical assistance for specific projects to member states, private enterprises and foreign investors within the boundaries of its member states.⁷¹³ Economic development assistance is directed at poor countries by providing them with long-term soft loans.⁷¹⁴ These loans allow developing countries to access funds and sustain economic development,⁷¹⁵ enabling them to provide better rates for foreign investment.

4.8.6 Conclusion

This chapter addressed various ways in which foreign investment may be protected in terms of international minimum standards of treatment, contractual guarantees and dispute resolution. It further dealt with how China protects foreign investors in its territory how international institutions play a role in the protection of FDI. The next chapter deals with the protection of foreign investment in South Africa. It looks at different, laws, regulations and policies aimed at protecting foreign investment.

⁷¹¹ *Ibid.*

⁷¹² The World Bank "What we do" <http://www.worldbank.org/en/about/what-we-do> (Date of use: 25 October 2016).

⁷¹³ *Booyesen H Principles of International Trade law as a Monistic System (2007) 133.*

⁷¹⁴ *Ibid.*

⁷¹⁵ *Ibid.*

CHAPTER 5: THE PROTECTION OF FOREIGN DIRECT INVESTMENT IN ACCORDANCE WITH SOUTH AFRICAN LAW

5.1 INTRODUCTION

The protection of foreign investment is a sensitive issue, and so are the different legal methods employed in protecting and regulating investment, which differ considerably, depending on the different jurisdictions. South Africa nationalised the FDI legal framework, the South African government arguing that the legal systems as enshrined in the Constitution, legislation and the judiciary are robust, independent and fair, and that there is no need to settle disputes with foreign investors via international forums.⁷¹⁶ The main purpose of the investment legal framework is to make the country a globally preferred investment jurisdiction.

In evaluating the investment legal framework in South Africa, the rights of foreign investors are evaluated below to determine their effectiveness. It is significant to determine the extent to which South African courts enforce foreign investors' rights when foreign investment matters are referred to them.

Equally important is the extent to which international law influences jurisprudence in South Africa and the government's track record in observing international legal obligations. These factors play a role in an overall evaluation of the existing legislative environment that a foreign investor would have to take into account when making an investment in the country.

5.2 THE CONSTITUTION AND FOREIGN DIRECT INVESTMENT

5.2.1 The Constitution in context and its recognition of international law

During the apartheid era, South African courts did not enforce international law, including human rights law or resolutions of the UN.⁷¹⁷ The apartheid government did not conclude BITs.⁷¹⁸ Most actions of the government during this time were contrary to the principles adopted in various international human rights agreements.⁷¹⁹ In 1993,

⁷¹⁶ Ngwenya M *The promotion and protection of foreign investment in South Africa: a critical review of Promotion and Protection of Investment Bill 2013 2015 University of South Africa Thesis* (unpublished LLD thesis) 5.

⁷¹⁷ *Id* at 57.

⁷¹⁸ *Ibid.*

⁷¹⁹ *Id* at 58.

the South African government introduced the Interim Constitution,⁷²⁰ which was replaced by the current Constitution in 1996. The 1993 Interim Constitution gave recognition to international law under sections 82(1)(i) and 231(2). These provisions are included in the Constitution, which entrenched customary international law in the judicial system.

The Constitution is the supreme law of the land, binds all branches of government, and supersedes all rules made by the government or the courts.⁷²¹ Therefore, any laws or rules of procedure that do not meet the constitutional muster would be deemed invalid.⁷²² This is borne out in the preamble and in section 2 of the Constitution. The Constitution is the founding document of the country⁷²³ and any law or conduct must be consistent with it to be valid.⁷²⁴

The Constitution is founded *inter alia* on the value of rule of law.⁷²⁵ The rule of law is an enforceable principle on which the exercise of public powers and legislative acts can be challenged.⁷²⁶ The rule of law comprises the following three main features:

- public power may only be exercised in terms of the authority conferred by law;
- everyone is equal before the law, and the law applies to everyone equally; and
- ordinary courts are responsible for enforcing ordinary laws of the land.⁷²⁷

Section 232 of the Constitution recognises customary international law as binding, unless it is contrary to the Constitution or to an Act of Parliament. Furthermore, in terms of section 233 the courts are required to choose a reasonable interpretation of legislation consistent with customary international law over any alternative interpretation that is inconsistent with customary international law. It is clear from these provisions that international law is recognised and binding in South Africa.

⁷²⁰ The Interim Constitution of 1993 (hereinafter referred to as the interim Constitution).

⁷²¹ Section 231(2) of the Constitution.

⁷²² *Ibid.*

⁷²³ De Vos P *et al* (eds) *South African Constitutional Law in Context* (2015) 3.

⁷²⁴ Section 2 of the Constitution.

⁷²⁵ *Id* at section 1 of the Constitution.

⁷²⁶ De Vos P *et al* (eds) *South African Constitutional Law in Context* (2015) 78.

⁷²⁷ *Ibid.*

Furthermore, international agreements and treaties to which South Africa is a party create binding legal obligations at an international level.⁷²⁸ South Africa is a signatory to a number of international treaties in areas including investment, trade, defence, taxation, customs unions and various other political agreements.

5.2.2 Foreign investor's rights and obligations in terms of the Constitution

In order to determine the scope and extent of the protection of FDI in South Africa, it is important to ascertain the definition of a juristic person. For this to be assessed, the following questions are analysed. Does the term 'juristic person' include a foreign investor? Does the term 'everyone' also include foreign investors? Does the term 'juristic person' mean a South African juristic person, or is it extended to foreign entities? Do foreign investors have legal standing to enforce rights such as the rights to free trade, equality, access to information, property and privacy, as contained in the BOR?

The Protection Investment Act defines an investor as an enterprise, regardless of nationality, making an investment in South Africa.⁷²⁹ On the other hand, the Companies Act,⁷³⁰ in its definition of a juristic person includes a foreign company and a trust, irrespective of whether or not it was established within or outside the Republic South Africa.⁷³¹ Since the Companies Act includes a foreign company in the definition of juristic person, one can conclude that a foreign investor is also a juristic person in terms of the Constitution. Therefore, a foreign investor is entitled to the same rights conferred to domestic investors and other entities. This means that a foreign investor is entitled to the rights and benefits contained in the BOR.

The Bill of Rights⁷³² contained in the Constitution is applicable to both natural and juristic persons.⁷³³ Section 8(4) of the Constitution provides that a juristic person is

⁷²⁸ *Ibid.*

⁷²⁹ Section 1 of the Protection of Investment Act.

⁷³⁰ The Companies Act 71 of 2008 (hereinafter referred to as the Companies Act)

⁷³¹ http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwil_biau6rQAhXDA8AKHeMJC4EQFggZMAA&url=http%3A%2F%2Fwww.justice.gov.za%2Flegislation%2Facts%2F2008-071amended.pdf&usq=AFQjCNFWF8oW9gDQeSBLyX-UopREaBqNHg&sig2=9BA9gLU61rHol-NFGIfP6A&bvm=bv.138493631,d.d2s (Date of use: 15 November 2016).

⁷³² Section 1 of the Companies Act.

⁷³³ Bill of Rights (hereinafter referred to as the BOR).

⁷³⁴ Currie I & De Waal J *The Bill of Rights Handbook* (2013) 30.

entitled to the rights in the BOR to the extent that is required by the nature of the rights and the nature of that juristic person. This provision affirms that juristic persons are entitled to existence and rights, which are not in all respect identical to those of their members for the purpose of applying the BOR.⁷³⁴

Currie and De Waal state that there are two factors that must be considered to determine whether the rights of a juristic person are protected by the Constitution, namely, the nature of the fundamental right in question and the nature of the juristic person.⁷³⁵ There are some fundamental rights that cannot be enjoyed by a juristic person, for example, the rights to life, human dignity and physical integrity.⁷³⁶

Section 9 of the Constitution contains the equality clause. In terms of this provision, 'everyone' is equal before the law and has the right to equal protection and enjoyment of the law. In the case of *Prinsloo v Van der Linde*,⁷³⁷ the court interpreted section 9(1) to entitle 'everyone' at the very least, to equal treatment by our courts of law and made it clear that no-one is above or beneath the law and that all persons are subject to law impartially applied and administered.⁷³⁸

However, section 9(1) of the Constitution is a general rule to which exceptions exist in section 9(2), which states that to promote equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken.⁷³⁹ This provision justifies discrimination or differentiation based on categories of persons. However, the question arises as to whether this provision is not in conflict with international law. The principle of 'non-discrimination' first emerged as a fundamental tenet of the GATT as well as a guiding principle in the Marrakesh Agreement Establishing the WTO, and was recently endorsed in multilateral instruments, such as the NAFTA, the Organisation for

⁷³⁴ Rautenbach M *Constitutional Law* (2012) 267.

⁷³⁵ Currie I & De Waal J *The Bill of Rights Handbook* (2013) 36.

⁷³⁶ *Ibid.*

⁷³⁷ The *Prinsloo v Van der Linde and Another* (CCT4/96) [1997] ZACC 5 (hereinafter referred to as the *Prinsloo* case).

⁷³⁸ The *Prinsloo* case para 22.

⁷³⁹ Section 9 (2) of the Constitution.

Economic Co-Operation and Development⁷⁴⁰ and the Draft Multilateral Agreement on Investment and IMST.⁷⁴¹

Foreign investment is further protected by the property clause in the Constitution in section 25(1). Section 25(1) provides that one may not be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property. Section 25(2) deals with the expropriation of property and lists the requirements for expropriation. In terms of this section, the expropriation must be:

- (i) for a public purpose or in the public interest; and
- (ii) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

The amount of the compensation, and the time and manner of payment must be just and equitable, reflecting a balance between the public interest and the interests of those affected, and must have regard to all relevant circumstances.⁷⁴²

5.3 THE PROTECTION OF FOREIGN INVESTMENT IN TERMS OF THE PROTECTION OF INVESTMENT ACT 22 OF 2015

5.3.1 The preamble

The Preamble of the Protection of Investment Act recognises South Africa's obligation to protect and promote investments including foreign investment. The Protection of Investment Act limits the scope of the application of FDI law, by requiring investment to be "protected in accordance with the South African law, administrative justice and access to information".⁷⁴³ This means that FDI must be applied within the realm of South African law rather than FDI law.

The question arises whether foreign investors under South African investment law are protected together with domestic investors. In terms of the Protection of Investment Act, an investor is defined as "an enterprise making an investment in the Republic

⁷⁴⁰ The Organisation for Economic Co-Operation and Development (hereinafter referred to as the OECD).

⁷⁴¹ Draft Multilateral Agreement on Investment (hereinafter referred to as the MAI).

⁷⁴² Section 25(3) of the Constitution.

⁷⁴³ See the Preamble of the Protection Investment Act.

regardless of nationality.”⁷⁴⁴ On the face of it, this section treats both domestic investors and foreign investors equally. However, the Preamble provides that South Africa has an obligation to take measures to protect or advance persons, or categories of persons, who were historically disadvantaged owing to discrimination.⁷⁴⁵

It is clear from the provision that foreign investors are not treated equally to domestic investors, and therefore, the protection of FDI is limited. The Protection of Investment Act further provides that the government have a right to regulate in the public interest.⁷⁴⁶ In order to do so, government conduct may be defensible when property is expropriated when in the public interest.

5.3.2 The right to regulate

Section 12 of the Protection of Investment Act grants the government or any organ of state certain powers, for example, the power to: redress historical, social and economic inequalities and injustices;⁷⁴⁷ uphold the values, principles and rights contained in the Constitution;⁷⁴⁸ and promote and preserve cultural heritage and practices, indigenous knowledge and applicable biological resources or national heritage.⁷⁴⁹ Furthermore, the Protection of Investment Act grants South Africa powers to regulate in the public interest.⁷⁵⁰

5.3.3 Establishment

Section 7 deals with the establishment of investments in South Africa. Section 7(1) provides that all investments must be established in compliance with the laws of the Republic of South Africa. This means that the Companies Act⁷⁵¹ will be applicable in this regard. Section 7(2) further provides that the Protection of Investment Act does not create a right for a foreign investor or prospective foreign investor to establish an

⁷⁴⁴ Section 1 of the Protection of Investment Act.

⁷⁴⁵ The Preamble of the Protection of Investment Act.

⁷⁴⁶ *Ibid.*

⁷⁴⁷ Section 12 (1)(a) of the Protection of Investment Act.

⁷⁴⁸ *Id* at 12(1)(b).

⁷⁴⁹ *Id* at 12(1)(d).

⁷⁵⁰ The Preamble of the Protection Investment Act.

⁷⁵¹ The Companies act 71 of 2008 (hereinafter referred as the Companies Act)
<http://www.bing.com/search?q=the+companies+act&src=IE-TopResult&FORM=IETR02&conversationid> (Date of use: 20 May 2016).

investment in South Africa. Therefore, South Africa has no obligation to establish investments for foreign investors or prospective foreign investors.

5.3.4 The fair administrative treatment

The Protection of Investment Act does not provide for fair and equitable treatment. However, it provides for fair administrative treatment. The Protection of Investment Act provides that:

“the government must ensure that administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural justice to investors in respect of their investments as provided for in the Constitution and applicable legislation.”⁷⁵²

This provision is problematic, because although it affords foreign investors administrative, legislative and judicial processes that are not detrimental to their investments, the protection is provided in accordance with the Constitution and domestic legislation. What happens when International investment law affords foreign investors more protection than the domestic law? Would it not be better if foreign investors were afforded the discretion to choose the processes that will apply to their investments?

Generally, foreign investors invest in a country where their investments will be adequately protected. For example, if the host state affords foreign investors protection that is equal or more than what is afforded on an international level, then the host state will still be an investment-friendly jurisdiction. However, if International law affords foreign investors more protection, they will be reluctant to invest in that country.

5.3.5 Legal protection of investment

The Protection of Investment Act distinguishes between the physical security and the legal protection of investment. However, in this study they will be dealt with under one heading. The Protection of Investment Act accords foreign investors a level of physical security equal to that of domestic investors in accordance with minimum standards of

⁷⁵² Section 6(1) of the Protection of Investment Act.

customary international law and subject to available resources and capacity.⁷⁵³ This provision does not make clear what protection foreign investors are entitled to.

This provision may lead to conflict between the domestic and FDI law. South African law is generally subject to the Constitution.⁷⁵⁴ The Constitution states that any law or conduct that is inconsistent with it, is invalid.⁷⁵⁵ This means that the validity of FDI law is not measured against the rules of traditional customary law, but the Constitution. Therefore, it will be difficult for foreign investors to invoke this provision for the protection of their investments in practice. Moreover, what happens in situations where the international minimum standard provides security, but the resources are unavailable? Would foreign investors address this in terms of FDI or domestic and capacity?

In terms of the Protection of Investment Act, FDI is protected only in terms of section 25 of the Constitution,⁷⁵⁶ and the FDI law is not taken into account. The Protection of Investment Act aligns expropriation and compensation with the Constitution and expropriation is now subject to compensation that is just and equitable.⁷⁵⁷

5.3.6 The national treatment

As said above, the right to equality forms the cornerstone of South Africa's legislation in terms of a democratic country. It is contained in section 9 of the Constitution. Section 9 states that 'everyone' is equal before the law, and has a right to enjoy full and equal protection of the law. The term 'everyone' does not preclude certain persons or entities in this provision. The equality clause attempts to undo the social structure that oppressed black Africans during the pre-democratic era.⁷⁵⁸ The equality clause further precludes discrimination based on the grounds mentioned in section 9(3) of the Constitution. The term non-discrimination is 'equality' expressed in the negative and only signifies an absence of discrimination.⁷⁵⁹

⁷⁵³ Section 9 of the Protection of Investment Act.

⁷⁵⁴ Section 2 of the Constitution.

⁷⁵⁵ *Ibid.*

⁷⁵⁶ Section 10 of the Protection of Investment Act.

⁷⁵⁷ *Ibid.*

⁷⁵⁸ Chow M W "Discriminatory equality v non-discriminatory inequality: The legitimacy of South Africa's affirmative action policies under international law" 2008-2009 *The Connecticut Journal of International Law* 306.

⁷⁵⁹ *Ibid.*

The Protection of Investment Act has included the national treatment standard although the scope is limited. In terms of section 8(1), foreign investors and their investments must not be treated less favourably than domestic investors in 'like circumstances'. In this instance, the principle of equality is recognised. This may include the treatment of a foreign investor with respect to establishment, management, acquisition, expansion, conduct and/or operation.⁷⁶⁰

In terms of the Protection of Investment Act, 'like circumstances' means the requirement for an overall examination of the merits of the case by taking into account all the terms of a foreign investment, including the:

- (a) "effect of the foreign investment on the Republic, and the cumulative effects of all investments;
- (b) sector that the foreign investments are in;
- (c) aim of any measure relating to foreign investments;
- (d) factors relating to the foreign investor or the foreign investment in relation to the measure concerned;
- (e) effect on third persons and the local community;
- (f) effect on employment; and
- (g) direct and indirect effect on the environment.⁷⁶¹

This section further provides for exceptions to the national treatment standard. For example, section 8(4) of the Protection of Investment Act states that subsection (1) must not be interpreted in a manner that will require the Republic to extend to foreign investors and their investments the benefit of any treatment, preference or privilege resulting from the following:

- "(a) taxation provisions in any international agreement or arrangement or any law of the Republic;
- (b) government procurement processes;
- (c) subsidies or grants provided by the government or any organ of state;
- (d) any law or other measure, the purpose of which is to promote the achievement of equality in South Africa or designed to protect or advance persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability in the Republic;

⁷⁶⁰ Subedi S P *International Investment Law: Reconciling Policy and Principle* 2012 98.

⁷⁶¹ Section 8(2) of the Protection of Investment Act.

(e) any law or other measure, the purpose of which is to promote and preserve cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage; or

(f) any special advantages accorded in the Republic by development finance institutions established for the purpose of development assistance or the development of small and medium businesses or new industries.”

It is clear from the above exceptions that they apply to foreign investors only and that the right to a national treatment standard is not absolute. The Protection of Investment Act does not define the ‘like circumstances’. Furthermore, even though in theory, it must appear as if the ‘like circumstances’ is a good concept. It is problematic in practice because a foreign investor will never be in ‘like circumstances’ with domestic investors.

For example, a domestic investor and a foreign investor who both invested in the same South African mining company, which in theory qualifies as a “like circumstances”, do not have equal rights even though they have both invested in the same industry. This is because there are certain benefits that are afforded domestic investors only by virtue of the fact that they form part of the categories of legal persons who are entitled to certain benefits even though the domestic and foreign investors are both investing in the same market. An example of such legal persons will be the historically disadvantaged.

5.3.7 Dispute resolution in South Africa

The Protection of Investment Act provides for dispute resolution in section 13. Section 13 of the Protection of Investment Act grants an aggrieved foreign investor a right to approach the Department of Trade and Industry to facilitate a resolution by appointing a mediator. In this regard, any domestic competent court or independent tribunal or statutory body has jurisdiction.⁷⁶² The foreign investor may utilise international arbitration after the exhaustion of domestic remedies, subject to the Protection of Investment Act, and only if the government consents to such arbitration.⁷⁶³

⁷⁶² Section 13(4) of the Protection of Investment Act.

⁷⁶³ Section 13(5).

This provision limits the right of foreign investors on many levels. A dispute resolution process may be expensive for foreign investors because they will have to seek domestic remedies first, before they can take a dispute to international arbitration. Foreign investors favour international dispute settlement panels that remove disputes from the host state's political and legal systems, offering the prospect of a neutral and impartial hearing. The Protection of Investment Act primarily emphasises municipal dispute resolution over international arbitration.

Furthermore, the aggrieved foreign investor may only approach international arbitration if the government will consent to such arbitration. Questions arise as to what will transpire should the government withhold consent if the request is deemed unreasonable and what will happen to cases where the government is also a party to such dispute? How will the government ensure impartiality in the resolution? It must be born in mind that international arbitration is subject to domestic legislation and does not make provision for international minimum standards of treatment. Foreign investors are subject to domestic laws, which by nature cater for South African nationals. An example of this is if the BEE legislations and policies which seek to redress the injustices that caused by apartheid legislation.

The lack of recourse in the case of investor-state dispute settlement in the form of international arbitration as a primary option is one of the main concerns for foreign investors. For example, in the case of expropriation, a foreign investor cannot approach international arbitration unless the local courts have failed to deal with the matter. The foreign investor is also not allowed to take the matter to international arbitration unless the government has consented to the proceedings. How does one uphold the impartiality of the government in the matter, if the government that is being sued is the same government that must consent to international proceedings of settling the matter against it?

The dispute resolution in terms of international law depends on whether the matter is between private investors, or between the state and a private investor. If the matter is between private investors, they can either take the matter on review through

international arbitration or diplomatic channels.⁷⁶⁴ With regard to investor-state dispute settlement, the parties to the dispute can either take the matter to international arbitration, the International Centre for the Settlement of Investment Dispute (ICSID), or the International Chamber of Commerce (ICC).⁷⁶⁵

By looking at these inconsistencies between the Investment Bill and the BITs, one can easily conclude that certain provisions of the Investment Bill will make South Africa a non-friendly investment jurisdiction. It does not allow for the diversity and flexibility offered by the international investment agreements. The “pull factors” of foreign investments such as market size and growth, the quality of the infrastructure, the presence of natural resources, the availability of skills and technology are crucial in FDI.

The “pull factors” of investments are very low in South Africa, while the “push factors” like economic and social dumping are reasonably high. The introduction of the Investment Bill is likely to impair the economy. The South African government has already introduced many amendments to the MPRDA, the Labour Relations Act,⁷⁶⁶ the BBBEEA, and the land reform process.

The flow of the FDI may also be affected by economic and social dumping. This occurs where a country lowers the price of one of its sales to operators in the domestic market.⁷⁶⁷ Economic and social dumping defeats the competition opponent to capture the market or so that the manufacturers and industry suffered losses.⁷⁶⁸ In other words, “dumping is selling goods at lower value than comparable like products in the market they have been sold”.⁷⁶⁹ Economic sanctions such as disinvestment may also affect the flow of the FDI.⁷⁷⁰

⁷⁶⁴ See s 11 of the Investment Bill.

⁷⁶⁵ International Chamber of Commerce (hereinafter referred to as the ICC). The ICC is an institution that promotes international trade and investment while helping business to meet the challenges of globalization.

⁷⁶⁶ Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA).

⁷⁶⁷ Sibanda OS “Can BRICS house stand longer when built on dumping ground? The Impact of South Africa’s Anti-Dumping measures BRICS’ Intra-Trade Relations” (Paper delivered at the UNISA research Indaba @ Law Retreat, 28-30 April 2015) 3.

⁷⁶⁸ *Ibid.*

⁷⁶⁹ *Ibid.*

⁷⁷⁰ Wood R M “A hand upon the throat of the nation: economic sanctions and state repression, 1976–2001” 2001 *SMU Law Review* 489.

A question arises as to whether the Investment Bill, if approved by parliament, will encourage foreign investors to invest in South Africa and thus contribute to the growth of the country's economy. Entering into BITs allows the parties to insert the standard of treatment adequate to both parties. Most BITs contain an umbrella clause also known as the treatment of state obligation.⁷⁷¹ The umbrella clause extends the scope and jurisdiction of the application of BITs.⁷⁷²

Taking cognisance of the fact that the South African government has a duty to ensure that its nationals benefit from the country's economic wealth, the question arises as to whether the enactment of the Investment Bill fulfils the constitutional requirements relating to securing sustainable economic development, and the promotion of justifiable economic and social development. Can the enactment of the Investment Bill protect and promote foreign investments in SA?

The government has an obligation to enact laws that will ensure that the entire population will actively share in the wealth of the nation derived from the FDI within the realm of domestic laws and international trade laws. Therefore laws must be enacted in such a way that they protect the interest of international investors and secure ecological sustainable development while promoting justifiable economic and social development.⁷⁷³ States are often confronted with the challenge of addressing their domestic political and economic situation while fulfilling their obligations to international investors who have invested in the country.⁷⁷⁴

5.4 THE EXPROPRIATION BILL, 2015 AND FOREIGN DIRECT INVESTMENT IN SOUTH AFRICA

South Africa is currently in the process of enacting the Expropriation Bill. This will repeal the Expropriation Act 3 of 1975. The Constitution does not specifically define expropriation. In the case of *Harksen v Lane*,⁷⁷⁵ expropriation was defined as "the

⁷⁷¹ The umbrella clause is a clause that is inserted into a BIT by which both parties make a commitment to each other to observe any obligation assumed by the conclusion of the BIT. See Salacuse J W *The law of Investment treaties* 271.

⁷⁷² Chaisse J and Bellak C "Navigating the expanding of international treaties on foreign investment: creation and use of critical index" 2015 *Journal of International Economic Law* 86-87.

⁷⁷³ See s 24(b)(iii) of the Constitution.

⁷⁷⁴ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2012) 59.

⁷⁷⁵ The *Harksen v Lane* NO 1998 (1) SA 300 (CC).

compulsory acquisition of rights in property by a public authority”.⁷⁷⁶ The Expropriation Bill also contains a similar definition to the *Harksen* case.⁷⁷⁷ This does not mean that the state must be the ultimate beneficiary in all cases for there to be expropriation.⁷⁷⁸

The Expropriation Bill provides for compensation for expropriation,⁷⁷⁹ and owners will be offered a certain amount for their property as determined by the Valuer-general.⁷⁸⁰ The amount offered will take into account, not only market value but also the purpose of the expropriation, the current use of the property, its history of acquisition, and the extent of direct state investment in the property,⁷⁸¹ all of which serve to essentially discount the price from its market value.

The Expropriation Bill allows the owner to challenge the compensation offered, but the owner would have to vacate the property⁷⁸² and would still be expected to maintain it until ownership changes.⁷⁸³ This is problematic because an owner could relinquish the full value or use of their principal asset for the duration of a court case which might drag on for years.⁷⁸⁴ Because litigation is expensive and the outcome uncertain, owners would also be under considerable pressure to accept the initial below-market value.⁷⁸⁵

Furthermore, the Bill does not contain the ‘prompt, adequate and effective’ compensation principles contained in the third generation BITs to which South Africa is a party. In essence, the Expropriation Bill will enable the state to pay for land at a value determined by a government adjudicator and then expropriate it in the national interest.⁷⁸⁶ Should the Expropriation Bill come into force, it will effectively scrap the

⁷⁷⁶ *Id* at para 36.

⁷⁷⁷ Section 3(1) of the Expropriation Bill.

⁷⁷⁸ Gray-Parker J “Why you should be concerned by the Expropriation Bill?” <http://www.privateproperty.co.za/advice/news/articles/why-you-should-be-concerned-by-the-expropriation-bill/4573> (Date of use: 12 December 2016).

⁷⁷⁹ Section 13 of the Constitution.

⁷⁸⁰ Valuer-General is an office created by the Property Valuation Act 17 of 2008.

⁷⁸¹ Section 12.2 of the Expropriation Bill.

⁷⁸² Section 6.3 of the Expropriation Bill.

⁷⁸³ Section 9.3 of the Expropriation Bill.

⁷⁸⁴ Gray-Parker J “Why you should be concerned by the Expropriation Bill” <http://www.privateproperty.co.za/advice/news/articles/why-you-should-be-concerned-by-the-expropriation-bill/4573> (Date of use: 12 December 2016).

⁷⁸⁵ *Ibid*.

⁷⁸⁶ *Ibid*.

current 'willing buyer-willing seller' approach to land reform⁷⁸⁷ and it will essentially form part of a number of other pieces of legislation, which have already come into force or are being proposed with a view to rectifying the imbalances brought about by apartheid.⁷⁸⁸

The way in which the government is tackling the land restitution issue has garnered criticism from all corners and has raised concerns about the stability of property rights.⁷⁸⁹ The Democratic Alliance⁷⁹⁰ argues that even though it is not opposed to expropriation, the party is concerned that 'property' was not defined which could mean that even intellectual property could be expropriated.⁷⁹¹

In terms of Section 1 of the Expropriation Bill, public interest includes the nation's commitment to land reform, and reforms to bring about equitable access to all South Africa's natural resources and other related reforms in order to redress the results of past racial discriminatory laws or practices. Public purpose includes any purposes connected with the administration of the provisions of any law by an organ of state.⁷⁹² Indeed, as things stand, it would seem that property of any kind could be expropriated for any reason that could be described as a 'public purpose', or 'in the public interest.

Jeffery⁷⁹³ argues that the Expropriation Bill in its current form is as unconstitutional as its predecessor, the Expropriation Act of 1975 and it leaves property owners open to massive losses should the government decide to expropriate their homes, land or other property.⁷⁹⁴

Just like the Protection of Investment Act, the Expropriation Bill has received criticism. The main concern is that the government is attempting to implement unconstitutional

⁷⁸⁷ *Ibid.*

⁷⁸⁸ *Ibid.*

⁷⁸⁹ *Ibid.*

⁷⁹⁰ Democratic Alliance hereinafter referred to as the DA).

⁷⁹¹ Dreyer A "DA to oppose problematic Expropriation Bill" <https://www.da.org.za/2016/02/da-to-oppose-problematic-expropriation-bill/> (Date of use: 15 December 2016).

⁷⁹² Section 1 of the Expropriation Bill.

⁷⁹³ Jeffery A is a head of policy research at the Institute of Race Relations.

⁷⁹⁴ Jeffrey A "The New Expropriation Bill is out and it's still unconstitutional" <http://www.biznews.com/thought-leaders/2015/02/18/new-expropriation-bill-still-unconstitutional/> (Date of use: 15 December 2016).

measures with regard to expropriation.⁷⁹⁵ The Expropriation Bill has alarmed foreign investors that South Africa maintains intentions to create conditions that are favourable for the expropriation of foreign investors' property.⁷⁹⁶ They are concerned that replacing a treaty between nations with municipal law makes foreigners susceptible to host state politics.⁷⁹⁷

Furthermore, foreign investors are alert to the threats being made by the ANC Youth League,⁷⁹⁸ the Economic Freedom Fighters,⁷⁹⁹ the National Union of Metalworkers of South Africa⁸⁰⁰ and other political formations with regard to policy changes that will allow expropriation and nationalisation of their property.⁸⁰¹ The EFF, in its 2014 Election Manifesto, called for the nationalisation of land, banks and other strategic industries without any compensation.⁸⁰²

Furthermore, the ANC as the ruling party used its majority vote on the portfolio committee to have the Expropriation Bill adopted even though the opposition parties voted against it.⁸⁰³ The DA raised 21 objections, including that the key terms 'property', 'valuer'⁸⁰⁴, 'expropriation' and 'owner' were so loosely defined that they could have unforeseen consequences. The DA Member of Parliament Dreyer⁸⁰⁵ raised the issues as to how the value of land was to be determined, and that the authorities can, theoretically, take ownership before making any payment.⁸⁰⁶

⁷⁹⁵ *Ibid.*

⁷⁹⁶ Ngwenya M *The promotion and protection of foreign investment in South Africa: a critical review of Promotion and Protection of Investment Bill 2013 2015 University of South Africa Thesis* (unpublished LLD thesis) 4.

⁷⁹⁷ *Ibid.*

⁷⁹⁸ African National Congress Youth League (hereinafter referred to as the ANC Youth League).

⁷⁹⁹ Economic freedom Fighters (hereinafter referred to as the EFF).

⁸⁰⁰ The National Union of Metalworkers of South Africa (hereinafter referred to as NUMSA).

⁸⁰¹ Gray-Parker J "Why you should be concerned by the Expropriation Bill?"

<http://www.privateproperty.co.za/advice/news/articles/why-you-should-be-concerned-by-the-expropriation-bill/4573> (Date of use: 12 December 2016).

⁸⁰² EFF "Economic Freedom Fighters Founding Manifesto: Radical movement towards economic freedom in our lifetime" <http://effighters.org.za/documents/economic-freedom-fighters-founding-manifesto/> (Date of use: 15 December 2016).

⁸⁰³ "The Expropriation Bill adopted despite 'no votes' from all opposition parties"

https://www.google.co.za/?gws_rd=ssl#q=The+Expropriation+Bill+adopted+despite+%E2%80%98no+votes%E2%80%9D+from+all+opposition+parties (Date of use: 15 December 2016).

⁸⁰⁴ In terms of section 1 of the Expropriation Bill, Valuer means a person registered as a professional valuer or professional associated valuer in terms of section 19 of the Property Valuers Profession Act 47 of 2000.

⁸⁰⁵ Dreyer A is a DA Member of Parliament.

⁸⁰⁶ Mail & Guardian "Parliament approves land expropriation Bill" <http://mg.co.za/article/2016-05-26-parliament-approves-land-expropriation-bill> (Date of use: 15 December 2016).

The EFF⁸⁰⁷ opposed the Expropriation Bill because the party advocates expropriation without compensation to white owners, claiming that the land was stolen from black South Africans.⁸⁰⁸ The Inkata Freedom Party⁸⁰⁹ argued that the provisions of the Expropriation Bill stipulating that the expropriated owner of a property remains responsible for the upkeep of the property after the expropriation has taken place, is nonsensical.⁸¹⁰ The UDM⁸¹¹ opposed the Expropriation Bill because the definition of 'property' was too limited and that the land dispossession compensation date should be prior to 1913.⁸¹²

From the above, it is clear that the Expropriation Bill has many loopholes and that, in its current form, may give rise to many constitutional issues and investment disputes in future.

5.5 THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT ACT 53 OF 2003 AND FOREIGN DIRECT INVESTMENT

In order to deal with the injustices of the past, South Africa has implemented policies and programmes that are aimed at uplifting and empowering persons from the designated groups through the BEE programmes. The BEE is defined as

“an integrated and coherent socio-economic process that directly contributes to the economic transformation of South Africa and brings about significant increases in the number of black people that manage, own and control the country’s economy, as well as significant decreases in income inequalities”.⁸¹³

The purpose of the BEE is to remove the anomalies and injustices that existed in South Africa during the apartheid era.⁸¹⁴ The BEE is founded in terms of section 9 of the Constitution. Section 9 of the Constitution provides that, to promote the achievement

⁸⁰⁷ Economic Freedom Fighters (hereinafter referred to as the EFF).

⁸⁰⁸ Mail & Guardian “Parliament approves land expropriation Bill” <http://mg.co.za/article/2016-05-26-parliament-approves-land-expropriation-bill> (Date of use: 15 December 2016).

⁸⁰⁹ Inkanta Freedom Party (hereinafter referred to as the IFP).

⁸¹⁰ Mail & Guardian “Parliament approves land expropriation Bill” <http://mg.co.za/article/2016-05-26-parliament-approves-land-expropriation-bill> (Date of use: 15 December 2016).

⁸¹¹ *Ibid.*

⁸¹² *Ibid.*

⁸¹³ Paragraph 35 of the Codes of Good Practice on Broad-Based Black Economic Empowerment, Code 000 of 2004 (hereinafter referred to as the CGP).

⁸¹⁴ *Ibid.*

of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken.

The BEE Act defines broad-based black economic empowerment as the economic empowerment of all black people through diverse but integrated socio-economic strategies that include, but are not limited to;

- (a) increasing the number of black people that manage, own and control enterprises and productive assets;
- (b) facilitating ownership and management of the enterprises and productive assets by communities, workers, cooperatives and other collective enterprises and;
- (e) preferential procurement.⁸¹⁵

However, the BEE Act itself does not set any BEE targets. Rather, it provides a framework for the implementation of diverse but integrated BEE initiatives throughout the economy. The BEE targets are contained in the Codes of Good Practice⁸¹⁶ in section 9 of the BEE Act. The CGP deals with the following among others:

- it defines key terms and concepts relating to BEE (for example, the definition of black people);⁸¹⁷
- it spells out the key principles for measuring BEE in a particular business entity;⁸¹⁸
- it specifies a scorecard against which enterprises' BEE contributions or scores will be assessed;⁸¹⁹
- it provides for the independent verification of those scores; and⁸²⁰
- it provides guidelines for stakeholders to draw up transformation charters.⁸²¹

The CGP obligates organs of state and public entities to take into account and, as far as reasonably possible, apply any relevant CGP issued in terms of the BEE Act.⁸²² In

⁸¹⁵ Section 1 of the BEE Act.

⁸¹⁶ Codes of Good Practices (hereinafter referred to as the CGP)

⁸¹⁷ Para 11 of the Codes of Good Practices.

⁸¹⁸ Para 12 of the Codes of Good Practices.

⁸¹⁹ Para 57-60 of the Codes of Good Practices.

⁸²⁰ Para 57 of the Codes of Good Practices.

⁸²¹ Para 15 of the Codes of Good practices.

⁸²² Section 10 of the BEE Act.

exchange, companies are awarded a BEE rating based on a scorecard.⁸²³ Only those entities that achieve a set number of points are permitted to enter into commerce with institutions of state.⁸²⁴ There are charters that have been agreed to by economic sectors that further drive the transformation plan, and companies, as part of their operating licences, are required to spend a percentage of profits made each year on corporate social responsibility programmes.⁸²⁵ Failure to comply with the BEE legislation severely limits the ability of an enterprise to engage in any economic activity that is within the parameters of the state.⁸²⁶

It is clear from the above discussion that the BEE Act limits the rights of foreign investors immensely, as it caters for the economic empowerment of black persons in South Africa. Generally, the BEE is a good concept that envisages remedy for the injustices of the past. However, the extent of its application is questionable. For example, more than twenty years have passed since the apartheid government ceased to exit. Would it not be a better idea to review the BEE policies and ascertain whether they could be redeveloped so as to benefit not only black persons in South Africa, but the country as a whole?

Currently, South Africa needs FDI to boost its economic growth. However, the BEE Act among other laws and regulations may deter foreign investors from South Africa. The affirmative action programme may further limit the rights of foreign investors.⁸²⁷ The affirmative action legislation requires companies to favour qualified black entrepreneurs in the procurement process, to promote the advancement of blacks in the workplace, and to award financial assistance for study.⁸²⁸

Affirmative action is mainly provided for in section 9(2) of the Constitution. By permitting legislative and other measures to be used to promote advancement of certain social

⁸²³ *Ibid.*

⁸²⁴ *Ibid.*

⁸²⁵ *Ibid.*

⁸²⁶ Coleman M and Williams K "South Africa's Bilateral Investment Treaties, Black Economic Empowerment and Mining: a Fragmented Meeting?" 2008 *Business Law International* 62.

⁸²⁷ Affirmative action is programme designated/disadvantaged groups who suffers or have suffered from the injustices or discrimination of the past.

⁸²⁸ Ngwenya M *The promotion and protection of foreign investment in South Africa: a critical review of Promotion and Protection of Investment Bill 2013 University of South Africa Thesis* (unpublished LLD thesis) 6.

groups, section 9(2) views affirmative action not as an exception to the principle of equality, but as a means of achieving equality.⁸²⁹ The affirmative action and other racial preference policies have rarely been challenged in the past; however, their legitimacy is now increasingly subjected to international scrutiny.⁸³⁰

Sibanda notes that political and socio-economic transformation in South Africa comes with responsibilities towards international actors. He argues that the country's BEE policies as it relates to FDI should be construed as reconciling its national interests to those in its bilateral and multilateral engagements.⁸³¹ He argues further, that ensuring that equilibrium is reached between interests and various dimensions of FDI in South Africa, BEE legislation and policies are part of the broader policy interventions for economic transformation in South Africa.⁸³²

However, in view of the fact that more than twenty years have passed since the advent of democracy in South Africa, the extent and content of the BEE legislation and policies are questionable. Will the country reach a point where equilibrium has been established between the historically disadvantaged and whites? Are these policies meant to be in force for an indefinite period or until such time when the scale is balanced? If the answer is indefinitely it begs the question whether South Africa will reach a reversed situation in which white citizens might become the historically disadvantaged?

The International Convention on the Elimination of All Forms of Racial Discrimination⁸³³ provides for proactive measures against racism and provides the basis for future tests as to the acceptability of such measures. It follows a holistic approach in this regard

⁸²⁹ Chow M W "Discriminatory equality v non-discriminatory inequality: the legitimacy of South Africa's affirmative action policies under international law" 2008-2009 *Connecticut Journal of International Law* 304.

⁸³⁰ *Id* at 292-293.

⁸³¹ Sibanda O S "The Promotion and Protection of Foreign Investment Law Bill: denunciation of BITs, and the de-internationalisation of investor-state arbitration in South Africa" 2014 *The Business and Management Review: A paper presented at an International Conference on Business and Economic Development, New York-USA* 164.

⁸³² *Ibid.*

⁸³³ The International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (hereinafter referred to as the International Convention on the Elimination of All Forms of Racial Discrimination).

and includes the notions of necessity,⁸³⁴ proportionality and time limits for affirmative action measures.⁸³⁵ Therefore, international law does recognise racial preferences such as the affirmative action; however, it recognises it only as a temporary and not permanent notion.

Sibanda admitted in his conclusion that, although his research paper focused on the de-internationalisation of Investor-State arbitration, the success of the entire South African investment legal framework lies in the maintenance of a conducive investment environment in general, that balances national interests and investment concerns.

5.6 CONCLUSION

This chapter was focused on the extent of foreign investment protection in terms of the Constitution. Whether the South African legal framework for foreign investment is sufficient to provide adequate protection to foreign investors and not deter them from investing in South Africa is currently unclear. In as much as there are regulations that recognise and protect foreign investors in South Africa, there are many other regulations and programmes that limit the protection, such as the BEE and affirmative action programmes, and other legislation such as the Expropriation Bill and the Protection of Investment Act. Gray-Parker argues that “while seemingly noble in the country’s intent to improve economic development, like so many things, the devil is arguably in the detail”.⁸³⁶

In the next chapter, the conclusions reached will be summarised. The chapter also contains recommendations for improving FDI inflow and economic growth for South Africa.

⁸³⁴ Articles 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination.

⁸³⁵ *Id* at 2(2).

⁸³⁶ Gray-Parker J “Why you should be concerned by the Expropriation Bill?”

<http://www.privateproperty.co.za/advice/news/articles/why-you-should-be-concerned-by-the-expropriation-bill/4573> (Date of use: 12 December 2016).

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 SUMMARY OF RESEARCH AND CONCLUSION

The first chapter looked at the problem statement of this study. This part of the study focused on the issues that confront states when dealing with FDI on both national and international level. The first chapter also looked at the investment policy review process which South Africa embarked on as a basis of the study. This is because the investment review process brought with it many changes to how South Africa will subsequently deal with FDI in its territory. For example, South Africa terminated some of its BITs and introduced the Protection of Investment Act. Even though the Protection of Investment Act is not yet in effect, it was approved by parliament on 15 December 2015.⁸³⁷

Chapter 1 also looked at various research questions which are fundamental to the study. For example, the following questions amongst others were posed: how was foreign direct investment regulated in the pre-1994 era in South Africa? What encouraged South Africa to introduce the Protection of Investment Act and phase out the BITs? Is it possible to have the Protection of Investment Act and BITs operate concurrently, and what will be the consequences thereof? Will the Protection of Investment Act uphold the constitutional values of South Africa? Does South Africa have a beneficiation strategy?

What are the international legal frameworks and standards that South Africa would have to comply with in order to enact the Protection of Investment Act? What are the international legal frameworks required to regulate FDI in a manner that will promote sustainable economic development and protect foreign investment in terms of section 24 of the Constitution? Why do developing countries with few nationals who are unlikely to invest abroad sign investment treaties with developed countries, which have the effect of restraining government's actions in their dealing with foreign investors? Will the FDI flow increase if South Africa regulates the investment sector without isolating itself from the international investment community? The aims and objectives of the study are also dealt with in the first chapter.⁸³⁸

⁸³⁷ Chapter 1 page 1-11.

⁸³⁸ Chapter 1 page 13-13.

Chapter 1 also looked at the various definitions of the key concepts that are used. It looked at the definitions of “international economic law”, “treaty” and “FDI”.⁸³⁹ It also examined the nexus between FDI and economic development and briefly described the factors that play a role in influencing FDI. The chapter further introduced the principles of international law that are aimed at protecting FDI in the host state.⁸⁴⁰

The modern FDI is the product of a historical process that has passed through different phases of development. Chapter 1 introduced the discussion of BITs by looking at the very first BIT that was concluded in 1959, namely the Germany-Pakistan BIT.⁸⁴¹ The Germany-Pakistan BIT represented the first generation investment treaties. Most of these treaties were based on friendship, commerce and navigation. This was the new era in international investment law. Soon thereafter, other states began concluding BITs with the purpose of promoting and protecting foreign investments in the host state.⁸⁴²

These second-generation treaties are BITs, which normally set forth actionable standards of conduct that applied to governments with regard to their treatment of investors from other states. The BITs were the second development in the investment development process and soon thereafter, many states entered into bilateral agreements. However, South Africa only concluded its first BIT with the UK in 1994, which came into force in 1998.⁸⁴³

Chapter 2 looked at the legal historic development of FDI in South Africa in order to ascertain the current legal position of FDI in South Africa.⁸⁴⁴ This signalled South Africa’s interest in being part of the international community, which lent its economy a hefty boost. South Africa terminated the UK-SA BIT in 2010.⁸⁴⁵ In 2010, South Africa began the process of drafting the Protection of Investment Act, that was published in the Government Gazette on 15 December 2015, but which has not yet come into effect. The Protection of Investment Act regulates both domestic and foreign investments in

⁸³⁹ Chapter 1 pages 15-20.

⁸⁴⁰ *Ibid.*

⁸⁴¹ *Ibid.*

⁸⁴² *Id* at 19-20.

⁸⁴³ *Ibid.*

⁸⁴⁴ Chapter 2 pages 22-25.

⁸⁴⁵ *Id* at 26.

South Africa. The second generation UK-SA BIT made provision for the host state to exercise its legal powers when accepting FDI into its territory.⁸⁴⁶ This allowed the host state to define the content and the scope of FDI to be accepted in its territory.

Admittedly, the UK-SA BIT had loopholes that needed to be addressed. For example, Article 3 required the contracting states to afford foreign investors national treatment without making provisions for reasonable exceptions.⁸⁴⁷ The termination of BITs by South Africa has received a wide range of criticism from different scholars and economists. These criticisms are dealt with in detail in Chapter 2 above. The termination of the BITs is still worrisome to some investors. The termination of the BITs was induced by the *Piero Foresti* case,⁸⁴⁸ which was the first case to challenge directly the BITs that South Africa had concluded.

Chapter 3 deals with the determinants of foreign investment in the host state. It looked at the following factors: country governance and political stability, constitutional right to property, potential economic growth, the rule of law, openness and transparency, the size of the population, and exchange rate consideration.⁸⁴⁹ The focus was on the importance of these factors, and whether they indeed play a role as determinants of FDI inflow.

According to a study undertaken by Luiz and Charalambous, the most important factors are the country's governance and political stability, potential economic growth, and openness and transparency of the government. These factors have more than 4 ratings out of 5. The size of the population scored the least points.⁸⁵⁰

South Africa has come a long way since the apartheid era. It has developed its laws in different fields. However, the country has not yet achieved economic freedom and stability,⁸⁵¹ and a lot still needs to be done in this regard. At present, South Africa is not doing well economically, compared to its counterparts. South Africa has been a

⁸⁴⁶ *Id* at 30-33.

⁸⁴⁷ *Id* at 31.

⁸⁴⁸ *Id* 34-41.

⁸⁴⁹ Chapter 3 pages 42-58.

⁸⁵⁰ *Ibid*.

⁸⁵¹ The aims and objectives of the study also forms the basis of this study.

democratic state for more than 20 years, but it is still a developing country and so are its laws. For this reason, South Africa is currently not in the position to foster international relations with other countries, the reason being that its economy is not strong enough to handle economic challenges unilaterally.

To a certain extent, South Africa has recognised this need and has attempted to remedy this error by enacting the Protection of Investment Act that is aimed at regulating foreign investment in South Africa. However, there are many loopholes in the Protection of Investment Act that need to be addressed, in order to make it attractive to foreign investors. The reason behind the Protection of Investment Act is legitimate, namely, to provide a more sophisticated regime for investment in South Africa, which will in turn attract more foreign investment.

However, it is submitted that the Protection of Investment Act in its current form will not be able to achieve these goals. The loopholes in the Protection of Investment Act, other legislation and policies need to be addressed, in order to be in line with the international standards of international law. The right of a foreign investor from the pre-inception stage to post-inception stage must be clearly defined.

The Protection of Investment Act generally limits the rights of foreign investors. This is so, despite the fact that these rights are standard at international level in terms of BITs and other treaties. An example is the right of a foreign investor to choose the institution and the law that will be applicable in the case of a dispute. At international law, the parties to a dispute have the autonomy to choose either the domestic law of the host state, or the law of another state, or international law. Objectively speaking, this approach seems to be preferable, because it is difficult to guarantee the impartiality of the presiding officer in a court of the host state.

Even if the presiding officer were to be impartial, the foreign investor would be more content to invest in a country where there is an option to choose the law that will be applicable in case of a dispute. This should be the sole prerogative of the parties, and it should be provided for by both the international law and the domestic law. Therefore, it would be preferable if the Protection of Investment Act provided that foreign investors can choose the law that will be applicable in a case of a dispute.

Like China, South Africa needs a more systematic and stronger protection for foreign investors. Both China and South Africa provide for the national treatment of foreign investors. However, the nature, scope, content and applicability of the national treatment differs between these two jurisdictions. For example, China in its new China Draft Investment Law makes provision for the adoption of the pre-establishment national treatment principle. This means that foreign investors need not apply for approval, unless the investment falls within the parameters of the negative list. In South Africa, foreign investors are required to meet certain extra requirements, in addition to those that apply to domestic investors, before they can establish an investment in South Africa.

Chapter 4 focused on the protection of FDI in accordance with the rules and principles of international law.⁸⁵² The chapter commenced by looking at the legal relationship between the host state and the foreign investor, which is based on key factors such as consent, transparency, and impartiality of domestic and international courts, effective remedies and an overall strong framework for international investment law. These factors also form the basis of standard provisions of BITs. Chapter 4 further described how FDI is protected in terms of international investment law from the investor's point of view. The International Minimum Standard Treatment⁸⁵³ is directly linked to the reasonable protection of FDI. This is because the reasonableness of the protection of foreign investment in the host state depends on whether the foreign investor has been granted an international minimum acceptable treatment by the host state.

The international minimum acceptable treatment is based on many principles in the field of international investment law, such contractual guarantees and IMST, aimed at protecting and promoting FDI. Examples of contractual guarantees are the stabilisation clause, the renegotiation clause, the umbrella clause, the governing law clause and the expropriation clause. Examples of IMST are the Most Favoured Nation⁸⁵⁴ standard, the full protection and security standard, the national treatment standard, and the Fair

⁸⁵² Chapter 4 pages 59-100.

⁸⁵³ International Minimum Standard Treatment (hereinafter refer to as the IMST).

⁸⁵⁴ Most Favoured Nation Treatment Standard (hereinafter referred to the MFN).

and Equitable Treatment⁸⁵⁵ standard. Some of these principles form basic provisions of BITs and are contained in the Protection of Investment Act.

Generally, the parties agree to all the terms and conditions of the agreement. This includes the law that will be applicable to the parties, whether in a case of a dispute before a domestic or international court, and the effective remedies that both parties are entitled to. The due processes of international investment law are also dealt with in Chapter 4. This part of the study looked at the nature, scope and content of investor-state dispute resolution mechanisms. The International Court of Justice,⁸⁵⁶ the arbitral tribunal, the Permanent Court of Arbitration and the International Centre for Settlement of Investment Disputes⁸⁵⁷ are institutions that are tasked with dispute resolution at the international level. At the regional level, the SADC tribunal is also tasked with resolving disputes. However, a foreign investor may refer the matter to these institutions only if the domestic law makes provision for it, as is the case in South Africa.⁸⁵⁸

China was used as an example to demonstrate how domestic investment law can be successfully developed. It serves as a perfect example, because it is a developing country, is part of BRICS, and, like South Africa is also in the process of reviewing its investment law. The six factors that influence FDI in China were discussed in detail in this chapter, as well as the nature and the content of protection of FDI in China.⁸⁵⁹ China's due processes were strengthened by its notice to the ICSID Secretariat that it would only agree to refer issues of compensation for expropriation to ICSID arbitration, and that consent for arbitration would be given on a case-by-case basis.⁸⁶⁰ In this regard, China ensured that subsequent treaties signed in the following years included the ICSID arbitration clause in line with this notice.

The last part of Chapter 4 dealt with international institutions that play a role in the promotion of FDI. The UN, the GA, the UN Commission on International Trade Law, the IMF and the World Bank all play a role in protecting and promoting FDI at an

⁸⁵⁵ Fair and Equitable Treatment (hereinafter referred to as the FET).

⁸⁵⁶ The International Court of Justice (hereinafter referred to as the ICJ).

⁸⁵⁷ The International Centre for Settlement of Investment Disputes (hereinafter referred to as the ICSID).

⁸⁵⁸ Chapter 4 pages 80-84.

⁸⁵⁹ *Id* at 92-97.

⁸⁶⁰ *Id* at 88-89.

international level.⁸⁶¹ The international principles, rules, standards, mechanisms and institutions collectively ensure that FDI is properly regulated, and that the foreign investor is protected from the pre-inception stage to the dispute resolution stage. All these factors are at the root of international investment law. Therefore, South Africa would benefit immensely if the international investment law, principles, standards, mechanisms and institutions were to apply equally to domestic investment law.

Chapter 5 looked at the protection and promotion of FDI in accordance with the South African law. The discussion commenced with the recognition of international law by the Constitution, as well as the rights and obligations of the foreign investor.⁸⁶² As stated above, the South African government has nationalised its FDI legal framework, and foreign investment is currently fully regulated in terms of South African law. It regulates FDI from the pre-inception stage, during the investment process and up to the dispute resolution stage. In terms of the Protection of Investment Act, foreign investors do not have a right of establishment of investment.⁸⁶³ There are no exceptions to this rule.

The Protection of Investment Act claims to afford similar treatment to foreign investors as compared to domestic investors. However, the truth is that in a practical sense, foreign investors will never be in a similar position as domestic investors. The reason is that there are policies such as BEE and affirmative action, which favour historically disadvantaged persons. This means that if the right of a foreign investor is in conflict with the right of a domestic investor, the domestic investor will always have preference. However, the Protection of Investment Act has also included some of the common provisions of BITs, such as the national treatment and the fair administrative treatment, which is similar to FET. The Protection of Investment Act also provides for the repatriation of property by the investor.

The worrisome provisions in the Protection of Investment Act are the expropriation clause and the dispute resolution clause. With regard to expropriation, the Protection of Investment Act states that the Constitution is applicable. The Constitution does

⁸⁶¹ *Id* at 97-100.

⁸⁶² Chapter 5 pages 102-122.

⁸⁶³ *Id* at 107-108.

provide for the protection of property against expropriation, but it makes provision for the expropriation of property in certain circumstances.

With regard to the dispute resolution mechanism, the foreign investor is required to exhaust all domestic remedies before a matter can be taken to international arbitration. Therefore, foreign investors are required to take the matter to domestic courts before they can refer it to an international forum. This provision may tend to be worrisome to some investors because it further defeats the principle of impartiality, as the judicial officer is a national of the host state. The laws applicable in the case of a dispute are the laws of the host state and not international law.

Both national and international law are very important in shaping the domestic affairs of any country. For this reason, one cannot apply the one to the exclusion of the other in matters on an international level, such as the FDI. It is, therefore, important to develop both the national and the international law in such a way that they apply concurrently in different circumstances.

Therefore, the question is, how then does one balance the national interest of the country and that of the foreign investor? For example, there are policies in South Africa that cannot be ignored, such as the BEE and affirmative action policies. The main aim of these policies is to protect the interests of historically disadvantaged persons in South Africa. The conflict between the interests of historically disadvantaged and foreign investors were illustrated in the *Piero Forresti* case. This case illustrated how disputes may arise, if the laws of the host state are not properly aligned with the rights of foreign investors. Therefore, it is important to balance the interest of foreign investors on one hand and the interests of South African nationals on the other.

Unlike BITs, which are in force only for the duration of the agreement, all legislation in South Africa is in force for an indefinite period. This means that all laws are in force until they are repealed. Therefore, all legislation that regulates foreign investors and their investments will apply until legally challenged and thereafter repealed. South Africa has not yet reached a stage in its development where its economy can survive without outside assistance such as FDI. South Africa needs FDI to increase its economic development, which has been deteriorating for the past few years due to

different factors, such as a drastic change in the investment legal framework, corruption and unsteady government, to name but a few. However, the economy of South Africa may grow further, and over a relatively short period of time, if the government re-evaluates its laws and policies.

6.2 RECOMMENDATIONS

It is important to note that South Africa does have international agreements and relations in place with other states. However, the agreements for specifically protecting and promoting foreign investments are currently not renewed when the period of the agreement expires. Section 15(1) of the Protection of Investment Act states that existing investments that were made under BITs will continue to be protected for the period and terms stipulated in the treaties. However, section 15(2) further stipulates that any investments made after the termination of BITs, but before the promulgation of the Protection of Investment Act, will be governed by the general South African law.

In this regard, the following recommendations that could have a positive effect on the country's economic growth are made. Firstly, the fact that South Africa has terminated some of the BITs creates the impression that it is voluntarily isolating itself from the international investment community. Instead of terminating the second generation BITs, the government could renegotiate them under different terms, in order to align them with the changing needs of the country. This will ensure that South Africa will benefit more from BITs and boost its economy.

Second, although the South African law and the country's judicial systems are solid and sophisticated, they could still be complemented by international investment law. Looking at it from the foreign investor's perspective, section 13 of the Protection of Investment Act may be worrisome to some investors. This section requires the foreign investor to obtain consent from the Minister of the Department of Trade and Industry before a matter can be elevated to the international investment arbitration in a case of a dispute. To resolve this issue, it would be better if the foreign investor were afforded an opportunity to choose whether to take the matter to a South African court, or an international investment forum.

Lastly, the IMST principles are one of the tools that may make a country an investor-friendly jurisdiction. These principles also form part of the common provisions of BITs and provide adequate protection to foreign investors in the host state. Therefore, the Protection of Investment Act should incorporate these principles with the aim of providing the same or better protection than is available at the international level.

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